Brown & Root USA, Inc. *and* International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO *and* West Virginia Building & Construction Trades Council, AFL–CIO. Cases 9–CA–27460 and 9–CA–27674

December 18, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND TRUESDALE

On April 14, 1994, Administrative Law Judge Robert G. Romano issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

We adopt the judge's findings that the Respondent violated Section 8(a)(3) and (1) when it refused to consider for hire, and to hire, applicants who stated on their application forms that they were voluntary union organizers for Boilermakers Local 667 (the Union) or words to that effect.[3]

As the judge found, the Respondent admittedly refused to consider for hire, and to hire, any of the applicants for employment who identified themselves as voluntary union organizers, because it attributed alleged mass picketing and picketing misconduct to the Union and its supporters and considered the applicants to be ''troublemakers.'' We agree with the judge that the applicants were legitimately seeking employment for personal financial reasons. Further, there is no evidence establishing that the Respondent's refusal to consider for hire, and to hire, these applicants for employment was attributable to any individual misconduct on the part of individual applicants. Thus, as the judge found, the Respondent did not rely on any of the applicants' *individual* picketing or other picketing-related concerted activities when it excluded them. Indeed, the Respondent treated the designation of ''volunteer union organizer'' status on their application forms as dispositive for purposes of disqualifying them for hire.[4] Further, as the judge also found, the evidence fails to establish that any of the applicants, in fact, engaged in disqualifying misconduct.[5] In these circumstances, we find that the Respondent violated Section 8(a)(3) and (1) because the Respondent's denial of consideration for employment and its denial of employment were attributable to the applicants' union status and affiliation, and the Respondent has not demonstrated that it would have disqualified them for lawful reasons even in the absence of their declaration of

[1] The Charging Party moves to strike the Respondent's exceptions for failing to designate page citations of the record relied on in support of its exceptions as required by Sec. 102.46(b) of the Board's Rules and Regulations. As the Respondent notes in its opposition to the Charging Party's motion, the Respondent's brief in support of its exceptions contains pertinent transcript citations. In these circumstances, we deny the motion because the Respondent's exceptions and brief, taken together, substantially, if not literally, comply with requirements of Sec. 102.46. *Williams Services*, 302 NLRB 492 (1991).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to any of the judge's findings dismissing portions of the complaint.

[3] The complaint alleges both a failure to consider for hire and a failure to hire. Based on the evidence presented and the manner in which the case was litigated, it is clear that both allegations were fully litigated and that the judge found both violations as alleged. We therefore modify the judge's recommended Order and notice to clarify that the Respondent violated the Act both by refusing to consider the applicants and by failing to hire them. As the judge found, the Respondent hired 212 employees at the project up to June 1990 and continued to hire for the duration of the 3-year project. Accordingly, it appears that the 47 discriminatees were denied employment to actual positions for which they were qualified. We, therefore, adopt the judge's make-whole remedy for the failure to hire the discriminatees. See *Casey Electric*, 313 NLRB 774 (1994). Cf. *Ultrasystems Western Constructors*, 316 NLRB 1243 (1995). Further, the judge's remedy, including its offer of employment and backpay requirements, permits the Respondent to litigate appropriate remedial issues at compliance. See *Dean General Contractors*, 285 NLRB 573 (1987).

[4] The Respondent contends that requiring the employment of union organizer-applicants effectively favors the employment of such applicants to the detriment of other applicants and interferes with the right of employees to refrain from self-organization. Contrary to the Respondent, we hold only that the Respondent could not refuse to hire qualified applicants for discriminatory reasons.

[5] With respect to alleged secondary activity, we find that no inference of disqualifying secondary conduct can reasonably be drawn from isolated instances when Larry Johnson and Lowell Templeton were present at the Rhone-Poulenc main gate. Moreover, as the judge found, these instances played no role in the Respondent's failure to consider for employment and to employ these employees. We also note that, consistent with the Respondent's contentions to the judge with respect to the Union's alleged unlawful recognitional picketing, such an alleged objective did not arise until, at the earliest, March 1990, several months after the Respondent's decision not to consider and employ the applicants. We find that the evidence does not establish that any applicant participated in any impermissible recognitional activity. With respect to other alleged picketing misconduct, we shall leave to compliance whether Jim Hudson Sr. engaged in disqualifying misconduct as the record is insufficient to determine whether Hudson engaged in a regular pattern of blockage of vehicles, as the judge found, or instead may have done so on only one occasion.

union affiliation. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).[6]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Brown & Root USA, Inc., Institute, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

''(a) Failing to consider for hire, and to hire, applicants who state on their applications ''Volunteer Union Organizer'' (or words to that effect) or because of their union or other protected concerted activities.''

2. Substitute the following for paragraph 2(a).

''(a) Offer the discriminatees listed on the Appendix employment in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, and make them whole for any loss of earnings and other benefits that they may have suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to consider for hire, and refuse to hire, any Boilermakers Local 667 applicant, or any applicant of any other union, who puts on his application ''Volunteer Union Organizer (or words to that effect), or because they engage in lawful activity in support of International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL–CIO and/or its Local 667, or any other union, or any other protected concerted activity.

WE WILL NOT tell our employees that if the Union gets in here, that none of us will have a job—or we'll all be out of a job or in any other manner unlawfully threaten our employees with loss of employment if they select the Union as their representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees, or applicants, in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer to the below-named applicants employment in the positions for which they applied or, if such positions no longer exist, to substantially equivalent positions, and WE WILL make them whole for any loss of earnings and other benefits that they may have suffered, with interest.

1. Asbury, Joe E.
2. Barker, Herbert
3. Blue, Deborah M.
4. Butcher, Michael
5. Carpenter, S. C.
6. Cashdollar, R. J.
7. Combs, William
8. Cox, Paul R.
9. Cronin, Jeffrey
10. Dew, Steve L.
11. Dougherty, Dan
12. Elliot, Ronald
13. Fisher, Charles
14. Fleck, Harvey A.
15. Frye, Paul D.
16. Gerlach, James
17. Griffith, Roger
18. Hale, Rodney L.
19. Haught, Michael
20. Hudson Sr., J.
21. Jeffers, Ira R.
22. Johnson, Larry
23. Kelley, Kenneth
24. Lamp, Rodney M.
25. Lowther, Andrew
26. Marion, Roger
27. Martin, Kenneth
28. Moore, Tamara
29. Morris, Raymond
30. Mosteller, Donald
31. Mosteller, E. W.
32. Mosteller, Gilmer
33. Oldfield, Tim W.
34. Pierson, Randall
35. Pinkerman, George
36. Prowse, Ralph A.
37. Skeens, James R.
38. Smith, Raymond
39. Sprouse, David L.
40. Swisher, Gary
41. Templeton, Lowell
42. Walker, Carl A.
43. Walker, Garrett
44. Wallis, Jerry A.
45. Wallis, Robert D.
46. Webb, Paul E.
47. Wise, Michael

WE WILL remove from our books and records all record of our unlawful refusal to consider for hire and to hire the 47 boilermaker applicants named above because they put on their application ''Volunteer Union Organizer'' (or words to that effect), or because they engaged in other Union, or other protected concerted activity, and WE WILL inform each of them in writing

[6] We adopt the judge's rationale and findings that Gary Swisher, James Skeens, and Michael Wise applied for employment and were not hired on the same discriminatory basis as other applicants-discriminatees.

We also adopt the judge's findings that Steve Dew, Carl Walker, and Swisher were denied employment on a discriminatory basis notwithstanding that their applications were not complete, inasmuch as the evidence does not establish that they would have been excluded from employment solely on that basis. We also find that the General Counsel established that Harvey Fleck and Gilmer Mosteller applied for employment, even though they did not testify at the hearing. At the hearing, copies of their applications were produced, and, as the judge noted, it was undisputed that the Respondent had received them.

that this has been done, and that any evidence of such action will not be used as a basis for any future personnel actions against them.

BROWN & ROOT USA, INC.

Mark G. Mehas, Esq., for the General Counsel.
Michael J. Bartlett, Beth C. Wolffe, and *Bonnie M. Deutsch, Esqs*., of Washington D.C., and *J. Richard Hammett* and *Katherine Ellis, Esqs. (Verner, Liipert, Bernhard, McPherson & Hand)*, of Houston, Texas, for the Respondent Employer.
Michael J. Stapp, Esq. (Blake & Uhlig), of Kansas City, Kansas, for Charging Party Boilermakers International.

DECISION

STATEMENT OF THE CASE

ROBERT G. ROMANO, Administrative Law Judge. These consolidated cases were tried in Charleston (or nearby St. Albans), West Virginia, on 32 days in 1991: on June 18–19; July 10–12 and 22–24; September 9–13; October 7–10 and 22–24; November 18–22; and December 9–13; and, after certain postponements due to incapacitating illness of two subpoenaed witnesses, in circumstances and with certain claimed effects that are more conveniently discussed (below), completed in 1992. It is presently only further noted that on Employer's motion filed on April 27, 1992, after an opportunity was provided to all parties to respond thereto, an order compelling production of subpoenaed documents issued on June 12, 1992, and the additional and concluding hearings were thereafter held on July 20–21, 1992.

International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL–CIO (Boilermakers International or the Charging Party) filed an original 8(a)(1) and (3) charge against Brown & Root USA, Inc. (Brown & Root or Respondent Employer) in Case 9–CA–27460 on April 18 (amended May 11 and second amended June 15), 1990. On basis of Regional receipt date stamps appearing on the back of the original charge, it appears the original charge was initially received in the Board's Regional Office for Region 6 at Pittsburgh on April 16, 1990, forewarded to the Board's Regional Office for Region 9 at Cincinnati, Ohio, as the Region with the assigned jurisdiction to conduct investigation at Employer's locality, and received by that Region on April 18, 1990, with that date then entered as the official filing date. An original complaint issued on July 31, 1990. On August 13, 1990, Employer filed its initial answer, denying commission of any unfair labor practices.

As Employer (in part) makes certain arguments based on charge content, it is presently observed the original *charge* in Case 9–CA–27460 essentially states that since on or about October 18, 1989, in violation of Section 8(a)(3) and (1), the Employer, Brown & Root, discriminatorily refused to hire or interview (certain) named employees for employment at their (Brown & Root's jobsite at) Rhone-Poulenc chemical plant at Institute, West Virginia, because of their (the named applicants') membership in Boilermakers Local 667.

In addition to general allegation of interference with, restraint, and coercion of employees in exercise of the rights guaranteed them by Section 7 of the Act, the initial underlying charge explicitly charged that in violation of Section 8(a)(1) and (3), Brown & Root had variously threatened with termination, harassed, and discriminated against (its employee) Thomas L. Lucas in retaliation for his engagement in protected (sic), concerted activity, protected by the Act.

The chemical plant at Institute was one formerly owned by Union Carbide, and it is still referred to by some employees as the Union Carbide plant. The chemical plant is presently owned and operated by Rhone-Poulenc AG, a French chemical company, though apparently Union Carbide has retained some unspecified interest in certain Institute plant properties that will eventually revert to Rhone-Poulenc. Both company names are displayed at the main gate (below).

West Virginia (State) Building & Construction Trades Council, AFL–CIO (Charging Party 2) filed an original 8(a)(1) and (3) charge against Brown & Root in Case 9–CA–27674 on July 11, 1990. It charged that since January 13, 1990, Brown & Root had refused to hire certain (different) named employees for employment at the Rhone-Poulenc plant, because of their membership in named (different) building trade local unions (i.e., other than Boilermakers Local 667) (materially) naming applicant Ralph Southall (a pipefitter), and a member of the United Association of Plumbers, Pipefitters, etc. (UA), Local 625. An initial consolidated complaint issued in Cases 9–CA–27460 and 9–CA–27674 on September 7 (amended October 11), 1990. A second consolidated complaint (G.C. Exh. 1(v) and the complaint) issued on November 20, 1990.

Unlike the underlying charges' explicit references to nonhire at Brown & Root's jobsite at the Rhone-Poulenc plant, the complaint alleges that on or about October 18, 1989, and at various dates thereafter, Respondent Brown & Root refused to consider for hire and/or has failed or refused to hire 49 named job applicants (the 48 originally named in Case 9–CA–27460 and Southall in Case 9–CA–27674), ''because they joined, supported or assisted the Boilermakers Union or other labor organizations and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection and in order to discourage employees from engaging in such activities for the purpose of collective bargaining or other mutual aid or protection[,]'' in charged violation of Section 8(a)(1) and (3) of the Act.

The complaint independently alleges that in violation of Section 8(a)(1) and (3), Respondent Brown & Root has discriminatorily coerced and/or harassed its employee Tom Lucas, by: on or about March 12, 1990, assigning Lucas to an isolated work area; on or about March 14, 1990, sending Lucas home early for the day; and on or about March 29, 1990, prohibiting Lucas from talking to employees at the jobsite. The complaint (as amended) also alleges Employer has independently interferred with, restrained, and coerced employees by: certain interrogations, threats, and/or coercive remarks, and, by certain other acts and conduct committed against employees in violation of Section 8(a)(1) of the Act.

Brown & Root sees the complaint in this matter as alleging that Respondent Brown & Root has committed the stated various violations of Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3), (the Act or the NLRA), but principally by Brown & Root's failing to hire or consider for hire the 49 individuals for construction work which Brown & Root was then under contract to perform for Rhone-Poulenc at its chemical plant in Institute,

West Virginia. Brown & Root defends the 48 Boilermakers Local 667 members were wrongfully directed to apply as ''voluntary organizers'' by Boilermakers Local 667, and it contends it was consequently under no obligation to hire them for nondisciminatory reasons, including the further reason, because the applicants participated in certain picketing that was conducted unlawfully in violation of Section 8(b)(1)(A), (4)(i), and (ii)(B) and Section 8(b)(7)(C) over a 9-month period.

The complaint does not explicitly state that Respondent Employer's alleged discriminatory refusal to consider for hire or to hire any of the 49 named job applicants was limited to an employment at the Brown & Root's Rhone-Poulenc jobsite at Institute. The General Counsel, however, at the hearing clarified and *limited* his contentions to such on the 48 boilermakers applicants, and all the evidence submitted (excepting as to Southall) relates thereto. (The Charging Party sees the 48 applicants' employment opportunities with Brown & Root elsewhere as a compliance issue.) Southall's application was considered by Brown & Root for employment by it at a Dupont plant jobsite (apparently) at Belle (southeast of Charleston), West Virginia. Though Southall had also submitted application for employment at Brown & Root's jobsite at Rhone-Poulenc's plant at Institute (west of Charleston), he did so much later than many other applicants (below).

Apart from the apparent two 8(a)(1) amendments to complaint that were made during the course of the hearing, and which the Employer has specifically opposed on Section 10(b), and other grounds, i.e., that they were matters earlier considered in connection wth other charges, on which complaint issuance was earlier denied (but in other circumstances that are more conveniently to be separately discussed below), complaint further independently alleged that, in violation of Section 8(a)(1), Respondent Brown & Root had on several dates (essentially extending over a period from mid-February through mid-April 1990) variously threatened its employees (with a discharge and/or layoff), because of their union activities on behalf of the Boilermakers and/or if Brown & Root's employees selected the Boilermakers International (or Boilermakers Local 667) as their collective-bargaining representative; on or about April 12, 1990, had informed an employee (at time of the employee's announced layoff) that another employee had *not* been laid off because of ''union politics,'' and on or about April 19, 1990, Brown & Root coercively interrogated its employees concerning their union interests and sympathies.

In answer(s) subsequently filed to (the consolidated, amended consolidated) and second consolidated complaint (on September 21, November 9, and) on December 12, 1990, respectively, as in its original answer, the Respondent has denied commission of any unfair labor practices. Respondent has also defended it did not consider the individuals named in the complaint as part of a pool of legitimate job applicants from which it has selected a portion of its work force; and, even if they had been considered, they would not have been hired, for reasons totally unrelated to any protected concerted activities.

A Preliminary Overview of the Parties' Multiple Contentions

Shorn of the parties' argumentative embellishments, the General Counsel and Charging Party Boilermakers International claim the 48 named Boilermakers Local 667 applicants were both qualified and bona fide, and they centrally point to their contention of an Employer admission that the 48 named applicants were not hired because they had put on their applications that they were Boilermakers Local 667 volunteer union organizers (or words to that effect). Both argue as legally and factually unfounded defenses that Respondent Brown & Root advances that range from claimed failure of proof that certain of the named individuals had actually filed an application with Brown & Root, to contention none of them did so in good faith, and/or that none enjoyed employee status, and protection under the Act. Both argue the urged defenses were not addressed at the time of Employer's decision not to consider for hire (or hire), and thus any and all reasons Employer has lately advanced at hearing, in defense of the Employer's alleged discriminatory failure to consider for hire, or failure to hire, any of the 48 named individuals are pretextual.

Respondent Brown & Root has acknowledged that it did not hire any of the above 48 named Boilermaker Local 667 applicants, nor even consider any of them for hire in the early times asserted. Employer contra defends, however, that it did not hire the 48 named applicants because they had put on their applications they were ''voluntary union organizers,'' but because it was fearful of hiring any applicants who claimed to be (organizing) agents of a union that was then sponsoring picketline misconduct. Similarly, Employer asserts it did not want to hire any declared applicant agents of a union that was then urging a boycott of its services through the use of picket signs that had, for example, demanded Rhone-Poulenc ''Send Brown & Root Home.''

Thus Employer argues, even if it be found that all the named Boilermakers Local 667 applicants did effectively file good-faith applications that might be protected under the Act under other circumstances, Employer contends here for forfeiture of their employment rights because certain of the applicants had engaged in unlawful 8(b)(1)(A) picket conduct, and, because almost all the 48 named applicants, at some point in time, engaged in picketing that is shown to have been conducted with an immediate (i.e., since outset of picketing on September 17, 1989) unlawful 8(b)(4)(i) and (ii)(B) picketing objective to get Rhone-Poulenc to cease doing business with Brown & Root and/or because the named applicants have later (in 1990) engaged in illegal 8(b)(7)(C) picketing at the jobsite. Employer thus contends even those who have not participated in any illegal 8(b)(1)(A)-type picketing have effectively forfeited any employment rights they may have had, because of their mere joinder in the building trades unions' picketing that from outset was conducted with an 8(b)(4)(i) and (ii)(B) object, and especially because their picketing with that objective (and the 8(b)(1)(A)-type picketing), had become even more apparent to Employer by the start of the material 10(b) period, beginning October 18, 1989.

Respondent Brown & Root has specifically defended that illegal picketing was at the outset initiated by the Charleston

Building Trades Council, under direction of its business manager, Bobby Thompson. Brown & Root contends that while Thompson attempted to avoid responsibility for the conduct of unlawful picketing by designating a separate Building Trades bank account called ''SAFE'' to fund the picketing at Rhone-Poulenc's chemical plant ostensibly by various members of the community, and union members as members of that community, under the guise of SAFE, the record in this case has overwhelmingly shown SAFE was nothing more than a ''front'' or ''alter ego'' for the Charleston Building Trades, whose affiliated unions, their members, and members' wives and relations have conducted the illegal secondary picketing.

Brown & Root further contends the record establishes Boilermakers Local 667 was jointly (or commonly) responsible with the Charleston Building Trades, and with the West Virginia Building Trades for such unlawful picketing, with multiple employer arguments resting upon claims of unequivocal building trades unions' common authorization, participation, ratification, condonation, leadership, and financial support of illegal picketing.

Thus Employer contends Boilermakers Local 667 (and other local building trades unions), under early leadership of Charleston Building Trades Council, had acted out part of their disappointment and frustration over Rhone-Poulenc's award of a substantial maintenance and construction contract to Brown & Root, by immediately engaging in unlawful picketing in that picketing was conducted by them with an objective to pressure Rhone-Poulenc to cease doing business with Brown & Root and to drive Brown & Root from the Institute community.

Respondent Brown & Root relatedly asserts when all the picket-related misconduct ceased in mid-June 1990, Respondent then changed its policy, and extended offers of employment to (certain) organizer applicants, e.g., to Southall, who was not hired only because Southall subsequently failed to meet the physical requirements of a Brown & Root job then available at a different jobsite with another employer (Dupont) where Southall had previously worked. The parties have stipulated that Respondent Brown & Root changed its rule not to hire any applicants that had put on their application they were volunteer union organizers (or words to that effect), *except, however, for the 48 named boilermakers' applicants named herein*. Contrary to contentions of both the General Counsel and Boilermakers International, Employer contends, that under a Johnson (unwritten, but justifiable) rule, Respondent did not thereafter offer jobs to the 48 applicants because by then their applications were considered too old.

Employer also contends that the picketing conducted in the material 10(b) period was conducted (in various manners considered below) in violation of Section 8(b)(1)(A). Although Brown & Root's project manager (Paul Pribyl, below) had expressed first concern with ongoing job sabotage within the plant, he asserted at the time of his initial decision not to hire the applicants (in pre-10(b) month of September 1989) that he was then also concerned with what was going on at the picket line advancing certain actions, that are incongruous with the timing of the initial decision not to hire and/or not attributable to them.

Respondent, however, contends by start of 10(b) period (October 18, 1989, the date on and after which complaint alleges Brown & Root failed to consider alleged discriminatees for hire), Employer had by then experienced a month of claimed illegal 8(b)(1)(A) picketing. It centrally defends that within that month, the virulent nature of the picketing *and* the role of local unions in it, including Boilermakers Local 667, had become quite plain, and, if it (Local 667's earlier role in picketing as evidenced below, through September 25, 1989) did not adequately justify the Employer's earlier refusal to hire boilermakers' applicants, Local 667's role in the interim in illegal 8(b)(4)(i) and (ii)(B) and 8(b)(1)(A) picketing before October 18, 1989, has justified the Employer's nonhire of the named boilermakers' applicants who had identified themselves as union agents (voluntary union organizers) in material 10(b) period, indeed, contends so even if Respondent Employer was not aware of their individual misconduct at *that* time. (Employer acknowledges picket line misconduct was much less so thereafter with certain injunction in place, at least until 1990.)

More definitively, the Employer contends that any boilermakers' applicant's employment right was forfeited because Boilermakers' officials were among certain individuals who were arrested at *Brown & Root's* gate on October 9, 1989, for obstructing traffic, and it has thus shown here Local 667's officers (and pickets) engaged in such misconduct approximately 1 week before the beginning of the 10(b) period at issue in this case. Employer asserts it established that a certain limited number (five) of the named Boilermakers applicant pickets have engaged in other disqualifing conduct on the picket lines, for hitting and damaging vehicles, throwing missiles at vehicles, and stating derogatory and/or obscene threats to employees crossing the picket line.

Contrary to fundamental contentions of the General Counsel and Boilermakers International that the Supreme Court and Board precedent warrants conclusion that individual applicants are shown to forfeit their rights under the Act only with an employer demonstration of misconduct by the given individual, and their companion contention that employer has not shown such here, Employer contends other Board precedent is applicable here, which supports its central contention that individuals forfeit their employment rights by participating in picket lines conducted with an illegal 8(b)(4)(i) and (ii)(B) and 8(b)(7)(C) objective.

Thus, fundamentally, Employer contends that the majority of the (48) named union organizer applicants, having admitted at trial that they at one time or another (whether before or after their application filing, but by far, mostly after) had participated in picketing (by whatever protest/demonstration name they may have used), which Employer asserts it has shown was picketing conducted from the outset with *an* illegal secondary objective of causing Rhone-Poulenc to remove Brown & Root from the job (whether engaged in at the Rhone-Poulenc main gate or limitedly at Brown & Root's reserved gate), then, it follows that all who have participated in any such picketing, irrespective of their declared and intended personal reasons for participating in protest/picketing (e.g., for safety reasons and/or concerns), are shown to have participated in the illegal secondary picketing. Employer also contends those who have picketed for safety reasons and concerns, but have admitted they did so even in a minor part with an intended objective to cause Brown & Root to be removed, have (at least) then forfeited their own employment rights. (The argument here is made seemingly regardless of

adequacy, or timing of proof of Local 667's secondary objective, or any visible demonstration of, or concurrent statement made of that objective on the part of individual applicant, other than that stated at hearing.)

The General Counsel and Charging Party Boilermakers International contrarily contend the 48 named Boilermakers applicants have engaged in lawful picketing, and particularly those who are shown to have engaged in picketing only at Brown & Root's reserved gate (even if other building trades unions picketed there) and, as to those named applicants who participated in no picketing at all, they both contend that Employer simply has no defense (e.g., to complaint's 8(a)(1) allegation). Both contend as significant that most of the Employer's arguments clearly rest on claimed facts that it was not even aware of at the time that it decided not to employ the 48 named Boilermakers applicants.

Employer contends contrarily that all these circumstances have privileged the Employer's failure to hire (or to consider for hire) in material times alleged (all) 48 named Boilermakers Local 667 volunteer union organizer applicants who have engaged in unlawful and disloyal secondary activity, even if engagement in the conduct is a fact that Employer has only determined well after its original decision was made not to hire any applicants who placed on their application Boilermakers Local 667 volunteer union organizer or words to that effect.

As a second prong of its defense, Respondent contends that Local 667 had wrongfully instigated a mass application campaign against Brown & Root over a 5-day period beginning September 19, 1989, by directing its members to write ''voluntary union organizer'' on each company application, as the Local had been instructed to do by Boilermakers International's director of organizing during a ''fight back'' seminar conducted earlier in February 1989. Respondent asserts it was patently inconsistent for Local 667 to urge members to participate in picketing to ''boot'' Brown & Root out of Institute on the one hand (a centrally contested predicate), and to simultaneously urge them to apply for jobs with the Company on the other hand—i.e., it was inconsistent, unless the filed applications were merely the vehicles for generating the unfair labor practice charges, and the embroilment of Employer in this extensive NLRB litigation, as a further means of pressuring Brown & Root out of Institute.

In major factual dispute is the evidentiary base upon which the Employer contends that the participation of Boilermakers Local 667 in claimed safety protest conducted at both Rhone-Poulenc's main gate and/or at Brown & Root's reserved gate, with various others, was with a secondary objective to obtain Rhone-Poulenc's removal of Brown & Root, rather than, as claimed by Employer's opponent parties, only a safety protest to inform the public that Brown & Root had an unsafe contractor history and, in that Boilermakers reasonably viewed its members as well trained in safety and safe workers, Local 667's picketing for safety reasons was wholly compatible with its independent implementation of the Boilermakers new ''fight back'' effort to secure employment for Boilermakers Local 667's members, whom it believed were well qualified in skill and safety, and to then seek to organize Employer's jobsite as a union contractor.

The General Counsel and Charging Party Boilermakers International thus argue the evidence supports their contentions that the Boilermakers members filing of applications was *first* only an independent, lawful, and protected action of Boilermakers Local 667 in implementation of earlier training in International's previously determined plan to ''fight back'' against nonunion contractors, here, the targeted nonunion Brown & Root, by seeking to obtain employment for its qualified members and then make the attempt to organize that job. *Second,* Local 667's safety protest was conduct that, whether it grew out of, or was separate from, its members' applications, was in either event compatible with Local 667's planned organization of the nonunion Brown & Root, whom it regarded on objective basis as with a record or history of unsafe work performance.

Third, Boilermakers Local 667 contends it lawfully joined with other Charleston Building Trades union affiliates (and other unions in the State) in Local 667's intended (and claimed) protected effort at ensurance of community safety by lawfully notifying the public at Employer's reserved gate of *its* own fairly held view that Respondent Brown & Root was a construction company with a significant past record or history of unsafe practices, while contemporaneously seeking to effect employment of Local 667's own journeymen by Brown & Root as a measure that it had reasonably deemed would ensure safety at the Brown & Root jobsite at the local Rhone-Poulenc chemical plant that does produce potentially dangerous chemical products in processes and/or operations it conducts in the Kanawha Valley, in which most of the applicants and their families live.

Thus, argument is made, Local 667's (safety) demonstration-picketing was compatible with its intent to ''fight back'' against nonunion contractors coming into their area, not by picketing with illegal objective of seeking to cause Rhone-Poulenc to cease doing business with Brown & Root because Employer is a nonunion contractor, but in implementation of its accepted new Boilermakers International fight back strategy to reverse declining membership, by taking action that serves twofold purpose of seeking to take advantage of an asserted Boilermakers member applicant's right to pursue nondiscriminatory employment opportunities for its well-qualified members by applying for available work with a targeted nonunion contractor, knowingly at lower rates, but with openly declared intent stated from outset to try to organize the nonunion contractor, Brown & Root, that had contracted a 3-year local construction jobsite.

Finally, the General Counsel and Charging Party Boilermakers International contend relatedly that the 48 named discriminatees, and Boilermakers Local 667 Union in particular, were only engaged in a ''fight back'' organizational effort involving the most fundamental of protected union and other concerted activity rights of employees under Section 7 of the Act, namely, prounion members' right to apply for jobs and be treated without discrimination, though the applicants openly declare, and in so doing make Employer aware, the individual applicant's plan to voluntarily help their Union to organize the unorganized in their area, even at their Union's collective urging.

Indeed, both the General Counsel and Charging Party Boilermakers International have contrarily contended that Employer's established failure to consider for hire or to hire the 48 named boilermakers' applicants because they put on their application they were Boilermakers Local 667 volunteer union organizers (or words to that effect) is in and of itself discriminatory. Consequently, they also argue that the great

weight of credible evidence shows that all of the Employer's presently advanced defenses for failure to consider for hire or to hire the 48 named Boilermakers' applicants are after the fact, and pretextual.

They additionally (alternatively) argue this Employer has long held strong antiunion animus that is evidenced in its central company policy to operate nonunion. They contend that policy, in combination with the Employer's early emphasis of it, and failure to consider for hire or to hire applicants who had put on their applications they were voluntary union organizers, establishes Employer's actions in that regard were discriminatory.

They also contend, in furtherance of Employer's openly declared antiunion animus, Respondent Brown & Root has otherwise displayed animus by independently interfering with, restraining, and coercing its employees in exercise of Section 7 rights during a subsequent 1990 organizing campaign on Employer's premises, when begun by employees who were hired only without declaring themselves to be Boilermakers volunteer union organizers, as is alleged above in the complaint.

But fundamentally they mutually contend that Employer's urged defenses for its refusal to hire job applicants because a large number of them have openly expressed on their applications their desire and intent to be volunteer union organizers for the Boilermakers Union, in and of itself, is nothing short of Employer conduct in direct conflict with the Act, given protective provisions of the Act for applicants not to be discriminated against because of their prounion bent, and the right of prounion employees upon their hire to engage in organizational activity.

Employer as fundamentally cross-contends a 10-year history of Boilermakers International's ''fight back'' effort being conducted all over the country leaves little doubt, as one administrative law judge (ALJ) has previously concluded in another mass application case, ''backpay, rather than bonafide organization, was the cornerstone of [the Boilermakers] strategy.'' *Sunland Construction Co*., 309 NLRB 1224, 1246 (1992).

Employer asserts the more credible evidence in this case demonstates Brown & Root did not commit any of the miscellaneous unfair labor practices that are alleged in the complaint, and which opponent parties have urged in support of their claims of Employer's antiunion animus. Employer contends its opponents are then hard put to show any supportive incidence of antiunion animus that exists, i.e., apart from allowed 8(c) expression of nonunion argument, viewpoint, or opinion. Employer otherwise argues hearing amendment allegations were not only improvidently allowed at hearing, but they are in any event unfounded and/or meritless. Employer has advanced arguments that (essentially) are based on contentions Boilermakers Local 667 applicants are not employees. Certain evidentiary procedural defenses are more conveniently addressed below.

The alleged discriminatory refusal to hire the 48 named applicants in Case 9–CA–27460 and Employer's multiple defenses thereto are considered in part I of the decision here. Allegations related to employee Tom Lucas and an (asserted) formal start of the Union's organizational campaign on premises in early (March) 1990, and related events contended to show independent animus are considered in part II, as are (lastly) there, the two apparent hearing amendment allegations, separately. Employer's alleged unlawful failure to consider for hire or to hire Ralph Southall (a pipefitter-welder applicant in April 1990) for its job for Dupont at Belle, West Virginia, is resolved in part III. The case presents classic clash of union and nonunion interests under the Act, but it contended changing construction union approach to reverse membership loss, by attempting to organizing the unorganized employed by nonunion contractors.

On the entire record, including my observation of demeanor of witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent Employer on or about February 18, 1993, and reply briefs filed on or about April 6, 1993, I make the following

FINDINGS OF FACT

I. JURISDICTION

Jurisdiction is not in issue. Brown & Root USA, Inc., is a corporation, with a principal place of business at Houston, Texas. It has been engaged as a contractor in the building and construction industry there and at various other locations throughout the United States, including, in times material, at Institute, West Virginia. The complaint alleges and Employer admits that at its West Virginia facilities, it has annually purchased and received goods and materials valued at in excess of $50,000 directly from points located outside the State of West Virginia. Brown & Root admits and I find it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The record also reveals and I find that Boilermakers International and its Local 667, located just outside Charleston, West Virginia, and WVA Building Trades Council and its member, Charleston Building and Construction Trades Council (Charleston Building Trades Council), each respectively, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Part I: The Alleged Discriminatory Refusal to Consider for Hire, or to Hire, 48 Named Boilermakers Local 667 ''volunteer union organizers''

A. *Background*

1. Brown & Root's operations in general and at Institute

Brown & Root is a major engineering and construction company that performs construction projects of various types throughout the United States. Employer refers to itself as a ''merit shop'' contractor, but it readily accedes it is referred to by others as ''nonunion'' because its declared company policy is to operate without any form of union affiliation, with Employer's stated reliance on General Counsel's Exhibit 5 (Charleston Gazette newspaper article of September 14, below) at paragraph 5, and see *Sunland Construction*, supra.

After a period of economic expansion and substantial decline, Respondent Brown & Root was rebounding. Internal company documents (C.P. Exh. 14, p. 2; Tr. 2867), in summarizing the Employer's economic history and work force, reflect Brown & Root's current work force was building

back over 40,000 after a history in the early 1980s of being a work force in excess of 80,000, with sales in excess of $11 billion, with normal profits; but in the mid-1980s, contracting to a work force of less than 20,000, with major layoffs, on $1.5 billion in sales, with a loss instead of profits. Employer then sees the case as arising out of Brown & Root's initial business entry in September 1989 into a generally organized West Virginia construction market.

The Employer correctly observes the Charleston Building Trades Council's unions had known for some time Rhone-Poulenc had intended to let out a major construction and maintenance contract, and they had anticipated the contract would be awarded to some local unionized contractors. In the fall of 1989, however, Rhone-Poulenc awarded the contract for construction and maintenance work to Brown & Root alone. Rhone-Poulenc apparently signed the contract with Brown & Root sometime in early September 1989, though it appears that a Brown & Root official (Paul Pribyl, the project manager below), in anticipation thereof, if not with prior awareness of a first contract award to them, had arrived in the Charleston area some time in August 1989. It is clear that Boilermakers Local 667 had some knowledge of the award on or before September 9, 1989, and more likely on or before September 1, 1989. Rhone-Poulenc security administrator, Kilburn, has testified credibly that reserved gates with signs, including one for Brown & Root (below), were all established by September 1, 1989.

By September 13, 1989, it was widely reported in local newspaper(s) that Brown & Root had signed a 3-year, $30 million contract with Rhone-Poulenc, that was effective on September 18, 1989. Brown & Root is reported as contracted to perform certain construction services and supplemental maintenance projects at Rhone-Poulenc's agricultural chemical plant located in Institute (a small community located by the Kanawha River, near Charleston, West Virginia).

Pribyl has testified more definitively that the contract signed was not actually of any specific dollar size. Pribyl recounts the original project was for construction of a Ventgas incinerator, a 3-month job, but they (Rhone-Poulenc) were also continuously upgrading facilities, with engineering additions, and *added* was some maintenance work.

Rhone-Poulenc employs approximately 1600 employees at its chemical plant in Institute, some 900 of whom were already represented by the International Association of Machinists and Aerospace Workers (IAM). Notably, IAM continued from time to time in its attempts to organize some other Rhone-Poulenc employee groups. Materially, it appears that IAM represents most but not all of Rhone-Poulenc's (and Union Carbide's) maintenance employees. In any event, Pribyl testified relatedly Rhone-Poulenc has a maintenance group that performs most of the ongoing maintenance, but ocasionally they get jobs that their maintenance group cannot do, because of manpower or a schedule requirement. Pribyl testified that Rhone-Poulenc had passed that maintenance work on to Brown & Root.

Under either circumstance, I presently find it is inherently plausible that Rhone-Poulenc employees represented by the IAM were also concerned with the above (maintenance) contractual engagement of Brown & Root just as the General Counsel and Charging Party Boilermakers International have advanced in regard to the makeup and message of certain of the individuals who participated in various protest/picketing lines conducted at Rhone-Poulenc, particularly those that demonstrated at Rhone-Poulenc's main gate (below).

2. Brown & Root's management

a. *At the corporate level*

Louis Austin Jr. is chairman of Brown & Root; and *Joe Stephens* is a vice president for employee relations and corporate affairs. *Max C. Kennedy* is a corporate manager of employee relations and apparent author of Brown & Root's written policy on ''Preventive Labor Relations,'' discussed below. The complaint alleges and Employer admits that Brown & Root employed *Frank Yancey* as division manager of construction through January 21, 1990, at which time Yancey became the Employer's vice president of Houston operations. In material times, Yancey had overall responsibility for Brown & Root's Rhone-Poulenc construction project. Harold Norman is Brown & Root's corporate security investigator.

b. *At the Rhone-Poulenc project level*

In all material times *Paul Pribyl* was the project construction manager at Brown & Root's jobsite at Rhone-Poulenc chemical plant in Institute. *Thomas Johnson* was Brown & Root's personnel manager (initially on temporary assignment to West Virginia), with personnel duties that covered recruitment of an initial work force for Brown & Root's jobsite at the Rhone-Poulenc chemical plant at Institute, West Virginia. Johnson was later permanently assigned there, for continued manning of that, and certain other jobsites, i.e., one for a Dupont plant located at Belle, West Virginia (and apparently to staff one later for Dow Chemical at Berry, West Virginia). Brown & Root has otherwise materially employed at its Rhone-Poulenc Institute jobsite: *Jesse Cowart* as its project pipe superintendent; *Oscar Cole*, a pipe and welding general foreman; *Tommie Fitzgerald* as pipefitter foreman (one of two, the other being *Preston Nickolas (Nicky) Moye*); *James Thorn* as Brown & Root's safety supervisor; and *Gary Wright* as chief warehouseman (responsible for all toolroom employees).

The complaint alleges, Respondent Brown & Root admits in answer and/or at hearing, and/or I find on the record before me that each of the above-named Brown & Root individuals employed corporately, or at Institute, in material times, are Brown & Root supervisors within the meaning of Section 2(11) of the Act, and that each is an agent of the Respondent within the meaning of Section 2(13) of the Act.

3. Rhone-Poulenc's management

Rudy Shomo was Rhone-Poulenc's plant manger at Institute at time of the contract award to Brown & Root, and thereafter until Shomo was succeded by *Ron Bearer* if not by January 1990 (at least) by the first of February. *Marcus E. Kilburn* was security administrator for Rhone-Poulenc at its Institute plant.

Brown & Root basically claims that when Rhone-Poulenc awarded the contract to Brown & Root, spokesmen for WVA Building Trades, Charleston Building Trades, and for Boilermakers Local 667 expressed their anger and frustration, and they thereafter engaged in certain illegal picketing activity, as

result of which, Respondent had no obligation to hire any of the individuals named in complaint.

4. The involved unions, officials, and leaders

a. *The WVA Building Trades Council*

Allen Fisher is secretary-treasurer of West Virginia State Construction and Building Trades Council (WVA Building Trades Council or State Council), of which the Charleston Building Trades Council is one of six affiliated councils. (The State Council has been in existence since 1957.) Fisher has been employed in that position for 12–13 years, and he has testified (at least at one point) that he is the only full-time employee of the State Council. (Everett Sullivan has been president and chair of the State Council for the same 12–13 years as Fisher.) The executive board of the State Council is composed of 15 who are (other than Fisher and Sullivan) vice presidents, and they (apparently other than Fisher) are presidents or business managers of the six regional councils that are affiliated. Fisher is chairman of the finance committee of the State Council, and he is executive director of State Council's Construction Trade Training and Advancement Program (CTTAP).

Fisher has regularly attended Charleston Building Trades Council's meetings whenever Fisher's schedule has permitted, and it is common (normal) for Fisher to participate in a given regional council's activities. Though Fisher rarely attends local union meetings, he did attend a Boilermakers International ''Fight Back'' seminar conducted for Boilermakers Local 667 in Charleston in February 1989, on written invitation of Local 667 (below).

As secretary-treasurer of the WVA State Building Trades Council, Fisher is also delegate to Kanawha Valley Labor Council (KVLC), a central labor council that is set up under the AFL–CIO. KVLC includes affiliation of all the AFL–CIO unions (extending beyond the building trades unions). Fisher has testified (I find credibly) that he was not very active in that council. Fisher, who had undergone open heart surgery in the past year, is one of two witnesses who had serious interim illnesses reported that (in substantial part) had delayed the completion of this hearing. Unlike the other such subpoenaed witness, Bobby Thompson (who underwent open heart surgery in late December 1991 before he had testified), Fisher had already testified substantially on October 22, 1991.

In presently pertinent part, however, Fisher had testified that he did not keep any SAFE records and that he had none to produce under a valid subpoena issuance for same. At times, however, Fisher indicated in his testimony there were some internal State Council records referencing SAFE which then appeared clearly material (e.g., certain checks that the WVA Building Trades Council sent to SAFE and its related authorizations thereon) as well as certain other records (including videotapes that he and/or others have testified he took of certain picketing) that were not produced at time of his October 22 appearance, though covered by Employer's lawfully served subpoena at the time, with results and other urged effects that are more conveniently discussed further, below.

b. *The Charleston Building Trades Council*

Bobby Thompson, a member of Ironworkers Local 301 in Charleston, is the business manager of the Charleston Building Trades Council. By virtue of his position as business manager of Charleston Building Trades Council, Thompson is also a member of the executive board of the WVA Building Trades Council. Since 1982–1983, Thompson has also been president of KVLC. (John Jarrett is president of the Charleston Building Trades Council as well as an official of Chemical Valley District Council (CVDC), an organization composed of numerous carpenter locals (materially) including the area's three operating carpenter locals.)

Eventually, in lieu of taking testimony from longtime and seriously ailing Thompson, and upon apparent production of certain documents, the parties then agreed to an introduction of Thompson's prior testimony given in the form of a 2-day deposition (begun March 22, 1990, R. Exh. 380(a), completed April 27, 1990 (R. Exh. 380(b)), in an apparent related civil action. Thompson there deposed that the council regularly negotiates common language matters, conditions, work rules, etc., for its various affiliated local building trades unions, but all money matters are negotiated by the individual Locals which are autonomous bodies.

c. *The Boilermakers unions*

The Charging Party in the main case of Case 9–CA–27460 is the Boilermakers International. *Charles W. Jones* is president of Boilermakers International, and *Newton Jones* is an assistant to the International president, its director of organizing and communications, and the managing editor of publications for Boilermakers International. In material times, the Boilermakers International also employed *James Bragan* and *Tony Yakomowicz* as International organizers (and Yakomowicz more recently as vice president). Local 667 is a chartered Local of Boilermakers International. *Jim McCormick* is business manager of Boilermakers Local 667; *Gilbert Lovejoy* is its secretary-treasurer; and *Ronald J. Bush* is the (only) assistant business manager for Local 667. The Charging Party's counsel of record at all times disclaimed any representation of Charging Party 2, or its charge in Case 9–CA–27674 in this proceeding. Although counsel for Charging Party 2 appeared during the course of this proceeding, he did so only limitedly in regard to subpoenaed witnesses (Thompson and Fisher) and on issues of production of their organizations' relevant documents.

d. *The interrelationships between WVA Building Trades Council, the Charleston Building Trades Council, and Boilermakers Local 667*

WVA Building Trades Council is an organization in which six regional trade councils in the State are affiliated, including the one at Charleston. Charleston Building Trades Council is an organization with which many of the local building trade unions that operate in the Charleston area are affiliated, including Boilermakers Local 667. As many as 30 local building trade unions (of an estimated 15 Internationals) are affiliated with the Charleston Building Trades Council (with some trades having more than 1 local union affiliated).

The Charleston Building Trades Council's organizational letter of February 27, 1990, listed its 16 covered crafts (here shown alphabetically), as follows:

Asbestos Workers	Laborers
Boilermakers	Millwrights
Bricklayers	Operating Engineers
Carpenters	Painters
Cement Finishers	Plumbing & Pipefitters
Electricians	Roofers
Glaziers	Sheet Metal Workers
Ironworkers	Teamster(s)

e. *Business agents of other trades prominently involved*

In so far as appears otherwise material to presently note in regard to the evidentiary contentions made: *Tommy Thompson*, not to be confused with (Bobby) Thompson, above, is business agent of the local, IBEW union (apparently) Local 466; and *Robert Sutphen* is the business agent of Carpenters Local 1207, one of three Carpenters local unions operative in the general area but apparently not with jurisdiction over the Institute area. Both of these locals are members of Charleston Building Trades Council.

These two business agents appeared on the picket line at *Brown & Root's* gate at different times (though Bobby Thompson had deposed that Sutphen was there very few times as it was not his jurisdiction). Members of other unions, both building trade unions, and others (local and otherwise), took part in the protest demonstration/picketing at Rhone-Poulenc's main gate, as unquestionably did some Rhone-Poulenc employees, some of whom were represented by IAM.

Employer's basic contention is, however, that WVA Building Trades Council has had such close ties to Boilermakers Local 667 as to render the contended illegal picketing campaign that Charleston Building Trades Council began on September 17, 1989, in reality, a common effort (pertinently) among these three labor organizations (i.e., the WVA Building Trades, the Charleston Building Trades, and Boilermakers Local 667).

In support, Employer contends it is significant that Boilermakers Local 667's interests at the WVA Building Trades Council are regularly represented by the Charleston Building Trades Council, whose Bobby Thompson is shown heavily involved with the secondary and other illegal picketing from the outset; and, the particular (financial) contribution of the WVA Building Trades Council to support the picketing conducted at Rhone-Poulenc is also significant, so the Employer claims, because WVA Building Trades Council also played a leadership role in the picketing (through Fisher's direct leadership participation).

At the outset it is readily apparent that Boilermakers Local 667 did not surrender its autonomy in affiliation with the Charleston Building Trades Council, any more than by its affiliation it could require the Council to do its bidding. The major *factual disputes* in evidence in part I relate to efficacy of Employer's various claims that (1) by virtue of Local 667's financial and other support of the Local Building Trades Council's picketing, that Local 667 has engaged in unlawful secondary picketing and/or (2) by virtue of Local 667's admissions in the minutes of its meetings, and urging of its members to participate in the picketing that was being conducted by others illegally at the Rhone-Polenc plant, and/or (3) by virtue of Local 667's own conduct on the various picket line(s) at Rhone-Poulenc, Boilermakers Local 667, and all its named member-applicants, must bear common responsibility with the other building trades unions for their having picketed at the outset with an illegal *secondary* objective. Employer's opponent parties argue illegal picketing is not shown attributable to Local 667 or its member-applicants.

The Employer contends Boilermakers Local 667's applicants have lost their protection under the Act, by virtue of Boilermakers officers' participation in contended 8(b)(1)(a) picket line misconduct (in blocking traffic) on certain days (and apparently without regard to whether any named Boilermakers Local 667 applicants are present at the time). There are factual disputes on Employer's claim that certain named applicants engaged in personal 8(b)(1)(a) misconduct on the picket line. To extent the parties may have contended relatedly that because the unions and SAFE have entered informal settlement agreements of 8(b)(1)(a), (4)(i), and (ii)(B), and 8(b)(7)(C) charges without a nonadmission clause (G.C. Exh. 28), those issues are neither raisable as a defense by Employer, nor contestable by the Union, the respective contentions appear without merit.

5. Rhone-Poulenc's reserved gates and related considerations

Rhone-Poulenc set up a series of five reserved gates on Route 25, a 55-mile-per-hour highway that runs east and west and is located directly north of, and adjacent to, the Rhone-Poulenc plant. Union Carbide owns an undeveloped woodland that is located directly north of and adjacent to Highway 25. Rhone-Poulenc's property line is south of Route 25, and set back 62 feet from Route 25's centerline. (State property includes a 10-by-12 foot berm along Route 25 near contractors gates, below.)

Although there was an initial dispute between the Unions and Rhone-Poulenc over it, it was determined (below) Rhone-Poulenc's property line abuts the state road's south berm, without easement. A chainlink fence borders Rhone-Poulenc's property line. Five separate gates are erected (essentially) parallel to each other though it also appears there is a slight curve in the road in the vicinity of Rhone-Poulenc's main gate (below). Otherwise, the five entrances and exits to Rhone-Poulenc's property are perpendicular to Route 25. When all the gates are opened, and as their individual gate signs appear when viewed by one looking south from Route 25 (toward the plant), and then panning one's vision west to east, the five gates are identified by signs, as:

1. (R P logo) Rhone-Poulenc CONTRACTOR GATE ''C.'' Separate sign states, ''BROWN & ROOT U.S.A., INC.'' Both these signs are posted on the fence west of the gate C entrance.

2. (R P logo) Rhone-Poulenc CONTRACTORS GATE ''A.'' This sign is posted on the *east* side of gate A entrance. Intended for other nonunion contractors, a sign posted *west* of gate A entrance states (only), ''NONUNION CONTRACTORS.''

3. (R P logo) Rhone-Poulenc CONTRACTORS GATE ''B.'' Separate sign states, ''UNION CONTRACTORS.'' Both signs are posted on the fence west of gate B entrance.

4. Next seen proceeding east is a west gate.

5. At Rhone-Poulenc's main gate, the top sign says, ''MAIN GATE.'' An apparent separate sign below states:

(R P logo) ***Rhone****-Poulenc*
Rhone-Poulenc AG Company
(Union Carbide logo) UNION CARBIDE CORPORATION

A separate sign below states INSTITUTE PLANT

Gates C and A also have a separate ''Private Property No Trespassing'' sign posted on the west side of their respective entrances. Gates C, A, and B have an additional separate sign placed directly over the above *contractor* identification signs (BROWN & ROOT U.S.A., INC., NONUNION CONTRACTORS, and UNION CONTRACTORS, respectively), each of which stated:

> (R P logo) Rhone Poulenc CONTRACTORS GATE
>
> This gate is reserved for the exclusive use of the following contractors doing business with Rhone-Poulenc or Union Carbide at the Institute plant. This gate is to be used at all times for entry and exit to [sic] Rhone-Poulenc property.

Gates C and A each are approximately 21 feet across, and gates C and A enter into a parking lot area that is commonly used by the contractors. There is some confusion as to distance between gates C and A. Kilburn estimated 20–25 feet between the east side of gate C and west side of gate A. Brown & Root security investigator, Norman, testified that from the east edge of the driveway at gate C to the west edge of the driveway at gate A was about 40–45 feet. Kilburn estimated that gate B is a little farther away (from gate A). Norman recounted definitively that from the edge of the driveway on the east side of gate A to the edge of the driveway on the west side of gate B (union contractors) is approximately 150 feet. In September–October 1989, Rhone-Poulenc had five union contractors on premises, three of which then employed (building trades.) Norman confirmed that Rhone-Poulenc's main gate entrance is located approximately three-fourths of a mile from gate B (R. Exh. 102).

Route 25 is a two-lane road at gates C, A, and (apparently) B, but it becomes four lanes before the main gate, where there is a traffic light. To the east of the traffic light, the four lanes are divided by concrete median strip separating east and west traffic. Located between gate B (union contractors) and Rhone-Poulenc main gate used by (union and nonunion) Rhone-Poulenc (Union Carbide) employees is a west gate also used by the same Rhone-Poulenc (Union Carbide) employees.

Rhone-Poulenc has video cameras installed at different locations on its premises. The parties appear to be in general agreement that conversations were not intelligibly recorded by available microphones in use, except for shouting, and only then under special circumstances. In all material times, one camera was located at Rhone-Poulenc's main gate in a parking area and one at its contractor lot (at gates C and A) at least through June 1990. (Rhone-Poulenc also had perimeter cameras on its east fence line and its back rail side.) In December 1989 or January 1990, Rhone-Poulenc installed an additional camera 25 feet directly south of gate C. All the cameras were controlled at Rhone-Poulenc's main gate, except apparently the one added at gate C that was controlled at a small trailer set on the parking lot at gate C.

Kilburn allowed that new contractor employees on first arrival at the main gate might park and first report to a receptionist and sign up, where they would receive instructions to thereafter use their designated gate exclusively. (On redirect, Kilburn clarified it was possible, but to his knowledge it did not happen.) Gates were enforced by security guards and vehicle display of sticker or decal. Kilburn explained the main gate has a guardhouse, and the Rhone-Poulenc and Union Carbide employees are issued a blue sticker for display in their vehicles. Contractors are not. Guards at the main gate enforce gate security on the basis of a blue sticker display. Nonetheless, the evidence appears conflicting.

Kilburn had related (plausibly) that if contractor employees come out for their first trip to the plant, just anybody is going to see the sign saying main gate and they might pull into a reception area there to sign up. On the other hand, Kilburn testified every contractor is instructed to use the correct gate and, if he saw violations of the gates, he would correct them.

Kilburn initially testified all of Brown & Root's deliveries and visitors came through gate C, as do Brown & Root's tools/equipment. Kilburn otherwise related Rhone-Poulenc generally provides the materials, and Brown & Root only provides the requisite labor. If Brown & Root were to order supplies and/or materials solely by one carrier Brown & Root would have their supplies come in through gate C. Brown & Root, however, regularly tells Rhone-Poulenc what (supplies and materials) they want, and Rhone-Poulenc gets it. When materials for Brown & Root are to be regularly paid for by Rhone-Poulenc, the materials go through Rhone-Poulenc's main gate and to Rhone-Poulenc's receivers.

Kilburn, however, did also testify it is very possible that if there was occasion when there was some material for Rhone-Poulenc, Union Carbide, and Brown & Root that would come in on a single truckload, that would also come through the main gate as invoiced first to Rhone-Poulenc building. They (Rhone-Poulenc) would not then ask that truck to offload Rhone-Poulenc (only), and then go out the gate and return through another gate (e.g., to offload Brown & Root materials). There is no evidence presented of that occurrence.

Kilburn testified Rhone-Poulenc finished building the above contractors' parking lot in February 1989; that it created gates A and B in May 1989, but did not give them the signage described above until about a month before (thus, August 1989) Brown & Root came to Rhone-Poulenc's plant (September 13, 1989), nor did it post guards at its (new) gates before August 1989. Kilburn related they first opened gate A for nonunion contractors and gate B for union contractors. They next opened gate C and had added signs for Brown & Root by September 1, 1989. They did not change gate lettering at that time, and he explained that is why gates placed west to east are now lettered C, A, and B (and then west and main gate). About the same time Rhone-Poulenc was completing its new parking lot for contractors, Boilermakers International was conducting a fight back seminar at Charleston for Boilermakers Local 667.

6. The Boilermakers International's ''Fight Back'' seminar conducted for Boilermakers Local 667 in February 1989

McCormick, who has been the business manager of Boilermakers Local 667 for about 7 years, testified that there are approximately 830 members in Local 667, of whom 550 members are active (in the sense of actively seeking work). Though McCormick initially recalled he attended a Boilermakers International seminar in 1987 on the Boilermakers International's fight back organizing program in the construction industry, he corrected himself and said it was held in February 1989, and there was only one. McCormick estimated that 150 to 200 of Local 667's members had attended the fight back seminar. McCormick also recalled that the seminar had explained the law and their rights in organizing. McCormick (initially) recalled that the first thing that they were to do was that his members would make application to (nonunion) companies and, if his members were hired, they would notify the Company that we (the Boilermakers union) are in an organizing campaign. McCormick did not know the steps to be taken after that.

McCormick has identified a January 29, 1989 notice (C.P. Exh. 9) that he sent out to Boilermakers Local 667's members urging them to attend a fight back educational program McCormick arranged to be put on locally by Boilermakers International on Sunday, February 19, 1989. Notably, paragraph 2 of the January 29, 1989 notice specifically informed Local 667's members:

> The program's primary purpose is to educate our members in the many ways we can legally mount opposition to the ''Non-Union'' movement that is gaining momentum throughout the United States. We need to arm ourselves with all the knowledge we can get to protect our work and strive to get back what we have lost over the years.

An earlier, related letter of Newton B. Jones, as International's director of organization and communications, dated January 9, 1989, informed McCormick:

> At your request, International President Charles W. Jones has directed that a ''Fight Back'' Construction Organizing Membership Awareness Program be conducted for the members and leaders of Boilermakers Local 667 in Charleston, WV.
>
> . . . .
>
> You are free to invite whomever you chose among other Building Trades crafts, including other craft members as well as local leaders. I would like to stress that this program is designed for our construction members and it allows for their full participation in discussing issues important to their everyday lives.
>
> . . . .
>
> We certainly look foreward [sic] to this meeting and to working with Boilermakers Local 667 to ''Fight Back'' against the nonunion contractors that are threatening ours' and our members' livelihoods. We have every confidence that the ''Fight Back'' strategy will work for Local 667 as it has for so many other Boilermakers construction locals around the country.

It is documentarily confirmed that McCormick invited Fisher to attend the fight back program that was held on February 19, 19*89* (R. Exh. 82). Thompson deposition does not appear to address the matter. Thompson did depose, albeit in regard to February 19*90* organizational movement of the Boilermakers (below), that the Boilermakers can do whatever they want, and he cannot tell them what to do. McCormick testified he saw the Boilermakers fight back program as an organizing program for membership, and to him it means fighting back against a losing or declining membership. Thus, according to McCormick, the objective of the Boilermakers International Union's fight back program is fighting back by *organizing* the unorganized, i.e., the nonunion contractors, to gain members; and, that it has no other objective.

McCormick also testified it (the February 1989 seminar on fight back) was an educational program of the Boilermakers International on the proper way to organize. McCormick recalled slides were shown in the February seminar on the declining membership, on different aspects of the law, and on the individual's rights. McCormick recalled subjects were covered on when it was appropriate to pass out authorization cards and to wear badges, and also there were discussions about discrimination. McCormick, however, recounted that his first involvement with organizing was with Brown & Root, and he has testified that he did not know the steps to take after members had submitted applications and were hired.

The general content of the February 1989 fight back seminar

Newton Jones has occupied the position of director of organizing and communications for the Boilermakers International since August 1986, after prior employment as a field organizer since January 16, 1981. Pertinently, Jones' duties involve the development and the administration of organizing programs: (1) such as the ''Fight Back Membership Awareness Program'' that declares ''We must react in kind and take the offensive with a massive, concerted building and construction trades organizing effort'' (C.P. Exh. 17, p. 4), and which is its stated purpose and (2) to provide guidance for local lodges and staff concerning organizing activity. Director Jones confirmed the fight back seminar provided training (by use of slides) on a five-phase ''Fight Back Strategy.''

Pertinently, phase one covered discussion of such subjects as: educating the Local; a hire-in strategy; applying for work; accepting employment; and preparing the committee (C.P. Exh. 18, p. 3), but core strength of the program is presented as the Union's legal right to organize. Director Jones has testified that the program is directed primarily to rank and file (Tr. 2534); however, he also testified that normally we simply allow the business manager to invite other crafts because we recognize that we cannot organize the industry by ourselves. We can only simply try and hopefully show enough progress to get other crafts involved (Tr. 2575).

Director Jones testified that Boilermakers International does not view a picket line use, except as it may be effectively used in support of warranted unfair labor practice charges, or, similarly, in support of recognition demand after an organization, as accomplishing the goal of reorganizing the market. Jones has testified (and others confirmed) a fight back strategy presentment covers that picket line violence

and/or sabotage activities are *both* illegal and simply not effective. To the contrary, Jones testified the fight back program tries to get them (local union members) to become part of a national strategy to reorganize the marketplace; one that recognizes at once that it is a monumental task and difficult, ''but that there is no other choice for us.''

Respondent Brown & Root was not the only party to reflect recessionary retrenchments in the early to mid-1980s. On cross-examination, Jones testified that the Boilermakers International had lost some 60,000 workers (or members) in a 10-year period, and Jones estimated relatedly that of some 100 fight back cases, 80 percent had occurred since 1986. Since 1986, Jones has put on between 40–50 fight back seminars, only 1 or 2 of which were put on in response to the requests of a Building Trades (rather than for a Boilermakers local union).

Director Jones acknowledged the Boilermakers International does not have a current program to train local members as organizers as such, but he confirmed they do give some organizing guidance in the membership awareness program, in telling the members to perform the work that they know how to do, to use their skills, and they are instructed that when they have the opportunity, before work, after work, on breaks, and during lunch hour, to simply talk to the other workers and to explain to them that if our Unions continue to erode and if our strength continues to erode they will be affected as well and that what the Boilermakers would like to do is to organize this whole industry again, and gain their support in that respect. Jones testified that lack of a more specific training program was because they were shorthanded until recently, but Jones categorically denied that the members were not being trained as organizers because the Union intended to be in this (NLRB) courtroom.

Director Jones has also testified that he (personally) thinks that area standards picketing is detrimental, primarily because of the reaction of the media. Jone testified, however, that he does not think there is any real harm if a picket line is informational, with the Union trying to concurrently get some particular piece of information across (e.g., as here, safety concerns).

Jones has acknowledged that one of the goals of the fight back program is that it would discourage, if it could, a use of nonunion contractors, through some process of advising the customer, e.g., through ''Organizer,'' a Boilermakers International newspaper (of irregular if not ended distribution), that it wanted to show that a nonunion contractor is not always the most competitive, and that the merit shop contractors are not necessarily what they claim to be. They wanted a customer to see that their members were good quality workers, and they would prefer that they use a union contractor and union-qualified workers. Jones testified, however, explicitly that if picketing is used to force an employer off the job that is an action Boilermakers International does not condone. It does not advise any local organization to engage in it. It discourages it in every way possible.

In contrast, Jones testified that they promote their own organizing strategy so that they (a local lodge) have some means to go out and organize a nonunion contractor and gain more employment for their members, whether it be through employment gained on the nonunion jobsite or through employment with a union contractor at some point. Jones acknowledged they have engaged in the past in picketing not only for unfair labor practices, but *they have picketed in cooperation with another trades union (e.g., Pipefitters, U.A.) in protest of what workers considered were unsafe conditions*, and on still other occasions the building trades have used a cooperative effort, and *the trades unions have used rallies of members and their families at a neutral location to protest employers' bringing in out-of-state workers, while local members remained out of work*. Jones also acknowledged there were (such) occasions in which the Boilermakers union was the primary participant.

Jones testified, however, he had no involvement in Local 667's fight back campaign at Brown & Root, and he did not think any of his representatives did, though that was subject to further check. In light of other evidence, Director Jones (at best) testified that he had no present awareness that anyone had. Jones did testify that any fight back campaign that his department would become involved with is one that they would have initiated in cooperation with a local lodge, *and one where an International representative (organizer) would be assigned to coordinate the organizing effort*. Jones testified flatly and convincingly that there was no such action (organizer designation) taken here, and I so find.

Jones confirmed Boilermakers International had put on its membership awareness program in February 1989 at the request of Boilermakers Local 667, but from what Jones understood, the Local had later that year initiated its own campaign and proceeded as such. Jones' knowledge and understanding of actions taken here were that this was ''a Local action taken to attempt to organize Brown & Root without International guidance or involvement from my office, and from what I see here, we're here because of that action.'' Jones added they may have called it fight back, but ''it was action that the Local apparently had taken, or actually the Building Trades, from my understanding had taken'' (Tr. 2554). Jones, however, promptly corrected that the Building Trades were autonomous; he did not know what the Building Trades had in mind, and he testified explicitly that he was not consulted. Jones affirmed that when it was shown that a business manager of a Building Trades was involved with a picket line, he guessed that the organizational entity was shown involved. There is some evidentiary indication of an earlier conclusion on his part that there was a joint fight back effort (see Jones' letter of November 21, 1989, below).

7. Some general considerations made in marshaling relevant evidence

The General Counsel's and Charging Party Boilermakers International's fundamental contention is that they have made out a strong prima facie case in showing that: (1) All 48 Boilermakers' members named in the complaint made genuine, timely, good-faith applications for employment with Brown & Root, under rules of application and interview that Brown & Root had established in conjunction with a state employment agency that it used, and Boilermakers Local 667's applicants, in declaring they were ''volunteer union organizers,'' made out applications in a manner heretofore determined protected by Board precedent. (2) The claimed 48 applications submitted to Brown & Root contained appropriate notice to the Employer, and Employer had consequent timely knowledge that applicants submitting themselves for hire were qualified and available and would be volunteer union organizers for Boilermakers Local 667 upon hire or,

in rare instance, one where the language was deficient in that regard, the applicant had otherwise indicated union membership and/or prior union employment in manner that was known by employer and, significantly, his application was treated the same as others who had declared they were volunteer union organizers. (3) Brown & Root's project manager, Pribyl, has admitted that at the time of the Boilermakers Local 667 applicants' submission of applications for employment with Brown & Root, Project Manager Pribyl instructed Brown & Root's personnel manager, Johnson, that any applicants who declared they were voluntary union organizers should not be employed. (4) Johnson affirmed that all the above-named applicants stating such were not thereafter considered for any Brown & Root employment, until Pribyl later changed that policy, only after all the picketing had stopped in June 1990, and even then none of the 48 named applicants have been considered for any employment with Brown & Root.

Contrary to Employer, the General Counsel and Charging Party Boilermakers International contend they have shown adequate proof of any requisite animus in that they show: (5) Employer has long had an openly declared policy of operating nonunion, and Employer's determination it would not employ any Boilermakers applicants who had declared that they were Boilermakers Local 667 volunteer union organizers (or words to that effect) itself exhibits sufficient animus and is discriminatory, and (6) there is evidence of independent Employer acts that is supportive of Employer's animus to union organizing. (7) All the named applicants who put that language on their applications were considered ''troublemakers'' and were not in fact ever employed by the Employer. Thus, there is a strong prima facie case made of Employer's violation of both Section 8(a)(3) and (1) of the Act. Both have also contended Employer's now urged defenses are shown of record as not timely considered by Pribyl (or Yancey) in reaching Employer's initial decision not to hire. They urge that it reasonably follows therefrom, under all the above circumstances, Employer's multiple explanations offered later at hearing (below) are all pretextual.

Employer contrarily defends: (1) These applicants were not employees, but only applicants, and some of them did not submit applications for employment to Brown & Root, others imperfectly so, and certain others did so unprotectedly in that they were at the time paid agents of Local 667. (2) All the applications were not submitted in good faith, but rather on union call, that was one prong of a union attack designed to illegally force Respondent Brown & Root out of the Charleston, West Virginia area. (3) The other prong of the plan involved ongoing protests or demonstrations about Brown & Root's safety at the plant, ostensibly to be orchestrated by SAFE, a purportedly independent organization that embodied a community effort, but which Employer claims was in reality only a front for Charleston Building Trades, through whose actions it has been made apparent of record only various unions' members (and relatives) had joined in a so-called safety protest that was in reality picketing being conducted with an illegal objective of seeking Rhone-Poulenc's removal of Brown & Root. (The Employer's opponents claim not only were environmentalists and other community groups concerned and involved, but also Rhone-Poulenc's own employees were involved at the main gate and concerned with and addressing their own perceived safety and/or other labor dispute with their Employer.)

Employer contrarily contends that (4) the early incidence of safety protests/demonstrations conducted at Rhone-Poulenc jobsite were conducted by the Building Trades, and joined in by Boilermakers, and as such were actually occasions of picketing conducted from very outset with a clearly revealed 8(b)(4)(i) and (ii)(B) design to get Rhone-Poulenc to cease doing business with Respondent Brown & Root, and any concurrent incidence of safety demonstrations with others elsewhere (e.g., at neutral locations) is simply irrelevant. (5) All the protest/demonstrations that ensued at Rhone-Poulenc were conducted in the main by the local Building Trades unions engaged in picketing that, from the start in 1989, before Employer even was on the job, is shown by certain signs in use (and literature distribution) to have been conducted with a common illegal purpose, namely, with openly declared secondary objective to get Rhone-Poulenc to cease doing business with Employer. (6) The same picketing was conducted in circumstances that were shown otherwise to be in violation of Section 8(b)(4)(i) and (ii)(B) in that picketing was conducted initially and repeatedly thereafter in violation of existing Board precedent on established reserved gates. (7) The picketing was also conducted in an illegal manner, in that it involved misconduct joined in by the individual applicants that has effectively restrained and coerced other employees in the material times alleged in the complaint, all in a manner that was in violation of Section 8(b)(1)(A). (8) Almost all, if not all, the 48-named applicants are shown to have individually engaged in disqualifying picketing in early 1990 (e.g., in Union's picketing over 90 days, without petition being filed), in clear violation of Section 8(b)(7)(C).

Finally, (9) Brown & Root has resultingly claimed that any applicants who have at any time participated in any such picketing have individually forfeited any employment right they may have earlier possessed, irrespective of when Employer determined their misconduct, and it further argues a total forfeiture of any individual's employment right is warranted irrespective of when it may appear an individual picket had first participated in earlier shown illegal picketing. Contrary to any claim advanced by the Union based on percentages employed, Employer contends the necessary statistical base to support such is not of record.

In general, after common background evidence is addressed, marshaling of evidence on subjects to be treated follows the structured prima facie case presentment, then Employer's claims of deficiencies in proffered prima facie case, and finally treatment of Employer's urged picket line defenses. Not only, however, is there necessitated some crossover in a development of the facts underlying the elements of the prima facie case presentment, but certain crossover facts are best presented chronologically. Similarly, there are some facts common to ready understanding with regard to the raised defenses of illegal secondary and/or of recognitional picketing that are also best presented on a chronological basis. Factual disputes whenever presented are resolved as soon as deemed feasible in a treatment of all relevant evidence offered. Factual determinations are made generally on weight of the evidence of record. Where demeanor was deemed to be a controlling factor, it is noted.

Disputes over claim of an individual applicant's participation in specific illegal conduct on the picket line is best shown by specific addressment in chronological developed picketing background, where that is possible. Quite often, however, the evidentiary accounts of the individual applicants first in making application, and then separately as to their independent participation in picketing, can only be prescribed in broad juxta-position to the Employer's contrary claims made, respectively, and then broad factual disputes resolved.

In the backdrop of the parties' multiple contentions, resting in part on their different views of certain existing Board precedent, personal picketing accounts derived from the testimony of 46 of 48 Boilermakers' applicants raise issues as to their actual involvement in any such claimed illegal picketing incidence, which range from some applicants with multiple and substantial instances of picketing, to others with limited picketing participation, to some with no instance of any picketing participation in 9 months at all.

In regard to the evidence addressed as in support of claimed picket line misconduct defenses, to the extent it is not stated below that there was specific incidence of misconduct by the individual in any of the incidents discussed below that were raised by the Employer, fair summary inference is to be drawn, even if not always directly so stated, that a conclusion was reached after consideration of all the evidence bearing on the matter, that the evidence of record simply did not establish there was the demonstrable 8(b)(1)(A)-type individual misconduct on the part of the named applicants, or a participation by them in picketing that directly revealed the given individual's active engagement in picketing in support of an illegal secondary objective. Left then for resolution as to any such individuals is only Employer's general claim advanced of warrant for employment forfeiture emanating from the individual's mere participation in picketing that may otherwise be shown picketing conducted by the union(s) with an illegal objective or in violation of Section 8(b)(7)(C). The parties legal arguments thereon are then addressed.

In the end, Employer's claims in fact in large measure rests on numerous instances of acceded (general) picket line participation by applicants, with the Employer urging that applicants, if not shown to have participated in the demonstrated independently coercive 8(b)(1)(A)-type misconduct, then to have participated at various times in claimed initially illegal secondary picketing shown such by the conduct of others and/or a general participation later in the claimed unlawful recognitional picketing in 1990.

Respondent Employer has introduced evidence of 46 picket signs (generally) claimed used in the 8–9 months picketing (R. Exh. 117), most of which I find had fairly clear safety connotation, even though about a half referenced Brown & Root by name. (On cross-examination by the Union, Kilburn acknowledged a number of them related to safety.) Employer, however, contends certain of the signs that referenced Brown & Root and/or Rhone-Poulenc clearly have a secondary intendment (in circumstance of use, as presented below). Of the 46 such signs, Kilburn testified (credibly) that all were used at the Rhone-Poulenc main gate except he was unsure of 3 (sign 6, ''I want to grow up here, not blow Up Here''; sign 21, ''Safety, Tell Rhone-Poulenc We Need Safety, Not Brown & Root''; and sign 28, ''Brown & Root Kills 'Em, We Bury Them.'' Kilburn also testified he never saw sign 46, ''Labor solidarity works for you.'').

In general, many applicants didn't carry signs. Of those that did, many carried safety and nonsecondary supportive signs, or only recalled generally they had carried a sign with a safety theme. None have testified that they *carried* any sign with secondary reference to Brown & Root. At best, factual and legal issues have arisen on the adequacy of Employer's attempted showing that Boilermakers Local 667's officials or its named applicants have carried improper secondary sign(s). If not shown, then question arises as to assesment of the Employer's claim Boilermakers Local 667 and its applicants must share in responsibility for mere presence (and/or other location use) of such signs by parties with whom Boilermakers Local 667 was joined in an otherwise safety protest that involved picketing, regardless of it appearing Boilermakers Local 667's officials, or its named applicants, who regularly carried signs, had limited their participation to safety themes.

In regard to Employer's contention that applicants forfeited their right to employment because of claimed misconduct resting on their individual participation in the conduct of a lawful picket line, on occasion conducted in an unlawful manner, or participation in a picket line being conducted with an unlawful objective, but one that is shown such only by the acts and conduct of others, e.g., on a picket line that may be shown illegal only by conduct of others at certain times when the individual picket is not even there, then, the time, place, and number of picketing events that are participated in by the given union, or joined in by a given individual applicant-picket would appear to take on more material significance, especially if (as here) it is apparent certain lawful picketing may also occur, and more so where there is only a late or isolated picket line participation shown attributable to a given individual, long earlier shown prima facie discriminated against in employment opportunity (let alone where there is no picketing participation by the individual at all).

The General Counsel asserts certain of Employer's broad forfeiture urgings are not encompassed within existing Board precedent but are unique. The Union claims Employer's urgings are administratively impracticable to any fair decisional assessment of individuals' statutory activities. The argument made is that the administrative burden of fair decisional addressment of the number of variables involved are such as are urged by Charging Party Boilermakers International as warrant in itself, contrary to the authorities urged by Employer, for the Board to hold in any claim of individual participation in an 8(b)(4)(1) and (ii)(B)-type violation, to what the Union asserts should be no different than the traditional requirement in any claimed individual participation in 8(b)(1)(A) misconduct, namely, before there is any forfeiture of an individual's employment right, it must be shown the individual has personally engaged in the charged misconduct, including engagement in picketing conduct evidencing picketing with an illegal secondary or illegal recognitional objective. The parties conflict over the existing authorities urged there is addressed in the analysis section below.

B. *The General Counsel's Prima Facie Case*

1. Rhone-Poulenc's award of a major contract to Brown & Root and certain related events

Respondent Brown & Root asserts and shows that in early 1989 the (Building Trades) local unions in the Charleston area knew that Rhone-Poulenc planned to accept bids on a $3 million scrubber construction and supplemental maintenance contract of about $30 million over a 3-year period. Apart from specific dollar amounts, I find the Unions knew it was to be a substantial contract, and probably knew from indicated consultations with union contractors (below), that it would be of that general order and magnitude.

The local unions had concerns (but anticipated) the contract would go to union contractors. Respondent Brown & Root notes Boilermakers Local 667's (contested) agent, Bill Thomas, has (in any event) testified uncontestedly that ''everyone in the [unionized] construction industry was really focused on this . . . all the Unions and the contractors were getting their heads together to submit bids and try to work out an agreement to get that contract.''

Respondent *centrally* contends that when Rhone-Poulenc eventually awarded the job to Brown & Root, it was Charleston Building Trades Council's business manager, Bobby Thompson, who then conceived of and initially directed picketing at the Rhone-Poulenc plant, under the guise of SAFE, in an effort to pressure Rhone-Poulenc to cease doing business with Brown & Root.

From the evidenced past conversations in which Rhone-Poulenc Plant Manager Rudy Shomo had said he had a brother-in-law who worked for Brown & Root, and that Brown & Root was a good company, I find Thompson likely knew all along that Shomo favored bringing Brown & Root in to do Rhone-Poulenc's construction *and* maintenance work. Thompson testified (in deposition) that he had talked often and cordially with Shomo prior to execution of the contract with Brown & Root, but Thompson first learned Rhone-Poulenc had hired Brown & Root only from the State's governor. Thompson deposed when he later spoke to Shomo about it, ''Shomo just lied like hell to me for one hour, and finally Shomo told Thompson that Brown & Root was coming in to Rhone-Poulenc.'' Thompson deposed he never spoke to Shomo after Rhone-Poulenc hired Brown & Root. Shomo did not testify.

There is other evidence (e.g., that reported by Rhone-Poulenc's security administrator, Kilburn) that Fisher had vented some of his own disappointment on the second day of picketing (September 18, 1989, Monday), by his cursing Rhone-Poulenc's manager, Shomo, for bringing Brown & Root to the plant. The Employer's argument is that this background forms an adequate predicate to support its claim that a secondary objective is shown (at least in regard to the State and Charleston Building Trades) in subsequent often seen picket signs in use in the picketing conducted at the Rhone-Poulenc plant, such as ''Rudy Shomo doesn't tell the truth,'' ''Rudy Shomo lies,'' and ''Shomo lies.'' There were other signs shown in use (below) that said, ''Give the boot to Brown & Root''; ''Shomo, Send Brown & Root home''; and ''Keep Brown & Root out of Institute.''

Employer has experienced the greatest factual dispute with opponent parties in attempts to tie Boilermakers Local 667's officials or Boilermakers applicants to such signs, and especially in Employer's attempts to establish they carried any of the claimed secondary signs that (essentially) said, ''Give the Boot to Brown & Root.'' Brown & Root would tie support of the contended secondary objective of those signs to the various unions' common expression of disfavor of Rhone-Polenc's award of the major contract to Brown & Root, and by contended common participation of Boilermakers Local 667 in picketing (protesting Brown & Root's safety record) at times when others had carried secondary signs, as evidencing Local 667 had actually picketed jointly with others with an illegal secondary objective. Thus Employer contends all the Building Trades unions' picketing, including that being ongoingly requested by Boilermakers Local 667 officials of its members (including member-applicants) was in furtherance of an illegal object to get Rhone-Poulenc to cease doing business with Brown & Root.

In contrast, the General Counsel and Charging Party Boilermakers International have contended that the testimony of Local 667 officials and its members, including member-applicants, clearly indicates most had picketed only at Brown & Root's assigned gate. They are shown to have carried only safety-related signs there and, even apart from those who did not picket at all, some did not carry any signs there, and some who did, did so infrequently. Many have recalled they carried innocuous ''Honk'' signs, and, of those who did not recall what the signs they carried said, in most instances otherwise did recall the sign related to safety issues (below). Moreover, since there was a labor dispute in existence, opponent parties assert even Boilermakers urging of a boycott of their (would be) Employer Brown & Root was not illegal, so long as a labor dispute existed.

2. The Charleston newspaper reports in circulation on September 13 and 14, 1989

Brown & Root started on the job on September 18, 1989 (Monday). Prior thereto, on September 13, 1989, a local newspaper, the Charleston Daily Mail (Daily Mail), published an article stating that a 3-year contract to modify older structures at the Rhone-Poulenc chemical plant had gone to Brown & Root. The article reported that the officials of the nonunion construction company (identified as Brown & Root) hired at Rhone-Poulenc's Institute plant had said (initially) that they planned to keep 75 to 100 local workers on the job at all times, and that their hiring was to begin September 18, 1989 (Monday).

This (and other) newspaper report(s) was (were) received not for the truth of the matters it (they) contained but as evidence of what was being widely disseminated in the newspapers, and thus made matter of public notice at the time to the Union, and I find its member-applicants. Accordingly, I find that as of September 13, 1989, it was made a matter of public information Brown & Root, a nonunion contractor, had been awarded the contract to perform the work at Rhone-Poulenc, and that Employer had (initially) stated its plan was to hire 75–100 local employees for the Brown & Root jobsite at Rhone-Poulenc's chemical plant, with its hiring to start on September 18, 1989.

Brown & Root Chairman Austin is reported as stating that the first project would be an updating of a scrubber, a matter Thompson confirmed in deposition. The article also reported the Company would remain nonunion though operating in the heavily organized West Virginia area. Brown & Root's

vice president, Stevens, is quoted as relatedly saying: (1) ''People have a right to organize—that's the law''; (2) ''But they generally haven't been successful at our sites.'' (3) ''We're a people program. Our workers have little to complain about. There's no need to have a union.'' A day later, on September 14, 1989, Stevens was quoted in an article in another local newspaper, the Charleston Gazette, as saying, ''We're basically an open shop with a people philosophy.''

The Daily Mail's September 13, 1989 article had also quoted Allen Fisher though there erroneously identifying him as president of WVA Trades Council, rather than correctly as secretary-treasurer of WVA Building Trades Council (and who is elsewhere of record erroneously identified as president of the Kanawha Valley Labor Council, rather than as a delegate to it), as saying: (1) ''We are very disappointed with Rhone-Poulenc'' and (2) ''Our people have worked at that plant two years ago, and even last year. It's very bad that they've decided to go in this direction.'' The same article, after reporting Fisher had said the construction unions are planning a publicity campaign geared against the nonunion company, quoted Fisher as saying, (3) ''We'll be demonstrating in Institute, Dunbar, Cross Lanes, South Charleston and Nitro.'' (The other named locations are local communities near Institute.)

Rhone-Poulenc's plant manager, Rudy Shomo, was quoted in the same article as saying, ''We're trying to get our costs down and become more productive[.]'' Perhaps even more materially, in the Gazette's September 14 article, *Shomo is then reported to have said that Rhone-Poulenc wants to use one company (Brown & Root) for such projects in the future, and Shomo is quoted as saying, ''They're a very broad based construction company. They can do just about anything.''*

Gazette's September 14 article reported, ''The union (in context Charleston Building Trades Council) has called a meeting of members at 3 p.m. Sunday (September 17) at the Teamsters Union Hall in Kanawha City to discuss ways to block the contract.'' The article quoted Thompson as saying, ''West Virginia and the Kanawha Valley are desperate for jobs—good jobs such as those in construction,'' and ''It's wrong for a Kanawha Valley industry to give them to people from out of state.'' (Thompson's prepared leaflets, pamphlets below, have essentially independently established he made such claims.)

From the outset safety was to be a *publicly* contentious factor. Thus, in a reported disagreement with Brown & Root Stevens' safety statement that the Company had an operation in a Waynesboro, Virginia plant that had not had a serious accident in 13 years (Bobby) Thompson is quoted as saying, ''What makes it especially wrong in this case is that the contractor also has a record of shoddy workmanship and putting profit over the safety [of] its workers.'' After report of saying he was not sure what action the Union would take against the Company, Thompson was quoted as further saying, ''We're not going to waste our time picketing[.]''

At hearing the Employer objected to the receipt of the newspaper articles it received for the truth of the statements they contained, but not in so far as establishing what was being reported by the local newspapers in general circulation in the area. They were received for that purpose and I find that all the above-reported information was circulated to the general public in that area and in that time frame. E.g., I have no doubt, and I presently find, Thompson subsequently received a substantial amount of inquiry on the question of safety from several sources, as he later deposed, in essential part because of the above news report of factual dispute over Brown & Root's safety and workmanship record in construction, as did, Rhone-Poulenc (below).

The General Counsel has advanced the Gazette article of September 14, 1989, as also showing the concern that the Unions had about Respondent taking away union jobs in the area. The General Counsel's witness Thomas has in any event independently testified relatedly, and more convincingly, the purpose of this (September 17, Sunday) meeting was to see what could be done to react to losing such a large number of union jobs to the Respondent. Thomas readily acknowledged, and his testimony in that regard is unchallenged, ''Of course we were upset. We were upset about losing all the work right here at home.'' Whether Thomas was an agent of the Boilermakers at that time, or not, weight of evidence makes clear that various unions, including Boilermakers Local 667 was upset on that account, as Thomas above recounts.

The reported size and startup aspects of the job; and the related activity of Brown & Root's project officials

In the September 14, 1989, Charleston Gazette article, Respondent Brown & Root's *first* project was there reported to be the building of a $3.2 million incinerator and scrubber to reduce chloroform emissions (and, that is otherwise essentially established of record was the case). In this report, Brown & Root's vice president, Stevens, was quoted as saying relatedly, Brown & Root ''expects to employ about 50 people in the project,'' and hiring was reported to begin on September 18 (Monday). Between September 19 and 25, 1989, 46 of 48 alleged boilermakers' discriminatees are shown (below) to have applied for employment by Brown & Root. Local 667 took timely action designed to man Brown & Root's employment needs on startup of the local project (at least) as last reported.

On assignment as project manager, Pribyl had moved to West Virginia in mid-August 1989 to locate housing. He transferred Personnel Manager Tom Johnson to Institute, West Virginia, from Houston, Texas. Pribyl set up a temporary office, and he began meeting with supervisors in setting up Brown & Root's procedures. Johnson confirmed he was brought in (initially on a temporary basis) about mid-September 1989. Johnson made certain arrangements (below) with West Virginia Employment Service (Job Service) on September 13, 1989, or thereabouts. Johnson began taking employment applications at that time.

Pribyl recalled onsite work on the project started on September 18, 1989 (a Monday), when they first mobilized the job. Johnson affirmed that Pribyl brought a few employees with him who were put on payroll on September 18, 1989 (though as he recalled), they began working September 19, 1989. Johnson hired a few employees (two–three electricians) that week. Pribyl essentially confirms Johnson's recollection on an initial few hires, and (generally) that within a few days of that Brown & Root began hiring. I credit Johnson, however, that the real start of his employment of local people was not until a week later, namely, the week of September 25. Indeed, Johnson testified that he did not hire his first pipewelder until September 27, 1989.

Pribyl continued to hire people throughout 1989, and has for the duration of the 3-year project to date. Typically, Employer's hiring process consisted of Pribyl and Johnson first looking at the work to be performed, determining the materials needed, and identifying the types of people they needed to hire to do the work. Pribyl would then fill out a requisition for the client (Rhone-Poulenc) to sign to authorize Pribyl to hire the needed people. When approved, Pribyl passed on the information (craft and number) to Johnson, who reviewed the pool of applications he had in craft folders (as shown prepared below). Johnson would then select and hire the necessary crafts/helpers.

The initial arrangements Johnson made with the Job Service was that after an intended Brown & Root applicant first registered with Job Service by filling out a Job Service employment form, a Job Service employee, usually Sam Rahill (then, or soon after) a Job Service supervisor assigned to serve recruitment needs of Brown & Root, would have the Brown & Root applicant fill out a Brown & Root application form. (From time to time there were apparently some other Job Service employees who would perform the above functions besides Rahill. But, normally it was Rahill who would in that manner process the Brown & Root job applicants for Brown & Root.) Rahill had his contact with an applicant in a work cubicle, described as a work area that was partitioned (i.e., with 5-feet wall partitions, but without walls extending to the ceiling), in contrast with wall to ceiling small office room in the rear of the building that Johnson used (on an apparent loan from Rahill) for Johnson's initial interview of an applicant (in the material times shown below). Johnson had use of a telephone there, but not storage, nor key to the building. Johnson carried his interview applications in craft folders in his brief case.

Johnson testified the only qualifications for employment by Brown & Root that he gave to Rayhill for journeyman level positions was that Johnson would like to see journeyman applicants have at least 4 years' experience in a heavy industrial environment. After an initial Job Service registration by a Brown & Root applicant filling out a Job Service employment application form, the applicant would fill out a Brown & Root application, given to the applicant by the Job Service agent, who would then normally (but not always), bring a Brown & Root applicant to Johnson for a brief (5–10 minute) interview.

Johnson has testified that he will usually not make interview notes on a journeyman's application, but he will on a laborer, or a helper's application. If Johnson enters a comment he will do it in the certain place that is designed for an interviewer's comments, such as noting the applicant would make a good helper. (It is apparent laborers and helpers were being interviewed.) Johnson may have had a few applications that he had not (yet) interviewed in his files, but he acknowledges and others confirmed he personally interviewed most of the Boilermakers Local 667 applicants named in the complaint.

After their interview Johnson put the individual's application into a craft file that he maintained, according to an applicant's stated ''first work preference.'' Johnson explained (plausibly) he has found that what job (craft) an applicant states as his first preference is what the applicant is most qualified to do.

When Johnson later received an authorization to hire a craft (or number of crafts) from Pribyl, Johnson went to his craft folder(s). Johnson would then review and select applicants for prospective hire. Johnson would try to check references on a journeyman (but he does not do so on a helper). Johnson then calls the selected applicant for second interview, and he makes the job offer. If an individual is hired, the individual's application goes into an employee folder. If not hired, the individual's application is returned to craft file.

There is conflict over how long an individual's application is actively considered in Johnson's craft file. There is no written rule on it. Johnson's surfacedly practical but inconsistently applied ''90-day'' views on it are more conveniently discussed and resolved below. They do not affect claimed prima facie case presentment.

3. The announced Building Trades Unions' publicity campaign and Charleston Building Trades meeting of September 17, 1989

WVA Building Trades Council Secretary-Treasurer Fisher had been earlier quoted in the Daily Mail's September 13, 1989 article as saying the construction unions were then planning a ''publicity campaign geared against the non-union company'' with demonstrations at Institute and other local communities. Such demonstrations were held, elsewhere. Materially, there was one held at Rhone-Poulenc jobsite starting on September 17, 1989. But see Kilburn's account below, that appears more incident of handbilling of literature, at a traffic light, in the four-lane Route 25 road, albeit in that sense in front of main gate entrance, but not in main gate roadway area. Many incidents of subsequent picketing were at the main gate (as shown below).

Employer otherwise relies on a Fisher general accession at hearing that a purpose of the picketing conducted at the plant could have been to get Rhone-Poulenc to get rid of Brown & Root. Fisher testified on Employer's inquiry:

> Q. Were you seeking to get Rhone-Poulenc to get rid of Brown & Root?
>
> A. Not entirely, that wouldn't have been the whole purpose.
>
> Q. But that was part of it.
>
> A. It could have been yes.

On reexamination, Fisher testified that if Brown & Root hired people who were qualified safe workers, that would have satisfied him. Fisher affirmed he felt there was safety in use of union contractors, in that they have an apprentice program, where people go to school for 4 years to learn a trade, and that program specifically includes safety training courses. Fisher also testified that he believed that they (union workers) are much safer workers. Fisher testified, however, that if Brown & Root had hired safe workers, that remained nonunion, he could have lived with that.

Employer testimonially counters with showing (of its belief) that it does hire skilled employees and that it provides them with appropriate and ongoing safety instruction and training, and in Thompson deposition pursued contention that it was irresponsible of the Building Trades Union (Charleston Council) not to take into account the size of Brown & Root in any safety comparison made with other construction companies. (The issue to be resolved here, however, is not

whether Brown & Root has a safe work history, or other deficient record, relative to other construction companies of equal or lesser size; nor is it whether the union(s) is (are) accurate in any specific assertions they have made in that regard (which are at best matters for another forum), but whether the Union has shown adequately of record that it has advanced its position in good faith that Brown & Root had an unsafe work history or other deficient record, and whether the named applicants in regard to a claimed protest of Brown & Root's safety record are to be viewed to have engaged in protected, and not disloyal, or unprotected conduct, while trying to be hired.

Employer's further stated reliance in brief (on McCormick testimony) that Fisher ''could very well'' have also told Boilermakers Local 667 Business Manager McCormick that the reason for the campaign was that Brown & Root was replacing union contractors at Rhone-Poulenc, appears misplaced. McCormick had promptly added he did not know that, and Fisher does not appear to have admitted that he had done so. In that posture of evidence, argument advancement on that basis appears to involve speculation, and even then, a speculated Fisher statement does not bind Charging Party Boilermakers International or its Local 667.

''Bill'' Thomas is a longtime member of Boilermakers Local 667, and at this time had been active in and regularly reported to the membership on Local 667's building fund construction. Boilermaker Herbert Barker testified credibly the Building Fund was a fund in which Boilermakers put 10 cents an hour to build their (Local 667's) new union hall and their new training building. There is no evidence presented that Boilermakers International or its Local 667 had ever employed Thomas as a *paid organizer*. (In contrast, see a related discussion, below, on the status of Thomas as a paid organizer of WVA Building Trades, with assigned duties to serve the affiliated Building Trades Councils, including Charleston, *but only first employed as such as of February 12, 1990*.)

Thomas testified concerning the meeting of the Charleston Building Trades held at the Teamsters' union hall on September 17, 1989, which he had attended. Thomas recalled Bobby Thompson, whom Thomas confirmed was the business manager of Charleston Building Trades Council (and president of KVLC), conducted the meeting. Thomas recalled the purpose of this meeting was to see what could be done to react to losing such a large number of union jobs to Brown & Root.

On cross-examination Thomas affirmed he attended the meeting on September 17, 1989, held at the Teamsters' hall to discuss ways *to block* the contract (for Brown & Root) to do the work at the Rhone-Poulenc jobsite. Thomas, however, has testified that he was there as an observer, and no decisions were made there. He asserts nothing came out of that meeting. It is clear of record certain basic decisions bearing on the Building Trades Unions' initial reaction thereto had been earlier made to fight back.

E.g., September 9, 1989 minutes of Boilermakers Local 667's executive board have recorded:

> Bus. Mgr. McCormick also informed the Executive Board that Rhone-Poulenc, a large chemical plant in Institute, WV had reportedly signed a [sic] agreement with Brown and Root to do construction and maintenance at their facility.
>
> The Charleston Building Trades representatives in a meeting passed a resolution for each Local Union to pay their fair share in a Fight Back effort.
>
> The Executive Board will recommend setting aside up to $1,000 from the Lodge treasury to help finance our share.

In regard to the question of Building Trades' and Boilermakers Local 667's relationship, the same minutes reflect McCormick's report on a new requirement of the Charleston Building Trades Council for an additional 5 cents per hour worked to remain in the Local (Charleston) Building Trades; a matter on which McCormick evidenced consternation over perceived inefficiency of the Building Trades in control of office expenses, but with a McCormick practical evaluation then made, ''to operate efficiently without the Building Trades could be even worse.'' In the minutes of the Local of even (sic) date, McCormick reaffirmed to the local union body, his own mixed feelings in paying it, though next stating, pragmatically, ''but we do need to be advised of prejobs and the other news involving the labor movement.''

Charleston Building Trades Council and Boilermakers Local 667 clearly have many common interests, but they are, and were at all material times separate and autonomous legal entities, as Thompson deposed, Director Jones has testified, and this record convincingly supports. The issue is whether their relationship was one in a given joint endeavor such as to warrant an imposition of joint responsibility for any established employer claim of secondary and/or other illegal picketing actions undertaken in response to the concerns commonly evidenced by the Building Trades Unions (and other unions, below) upon arrival of Brown & Root at Rhone-Poulenc's chemical plant at Institute.

Presently, I note and find a motion was made by McCormick in the meeting of September 9, 1989, ''to set aside up to $1000 to help the Building Trades fight the battle and pay our fair share of the expenses.'' The motion was duly seconded and carried, and thus became Local 667's approved action on September 9, 1989. Letter of Boilermakers International President Jones to Local 667's secretary-treasurer, Gilbert Lovejoy, dated September 26, 1989, confirms receipt of Lovejoy's subsequent ''September 14, 1989 letter, wherein you request approval to segregate $1,000 from the Lodge treasury to help pay Lodge 667's fair share of the expense in the 'Fight Back' effort initiated by the Building Trades against Rhone-Poulenc and Brown & Root.'' In addition to notice of its approval of that expenditure, Boilermakers International direction was given, ''You are requested to provide my office with a full accounting of the expenses incurred in this matter upon conclusion.'' Courtesy copy (cc) was provided to several individuals, perhaps most notably, to the International's director of organizing, Jones. Thus I find that Local 667 did help to finance a Charleston Building Trades fight back effort from the start. But so did many other local unions, inside and outside Charleston Building Trades Council, and all have (at least surfacedly) joined in support of declared critical view of Brown & Root's safety record (below).

4. The initial handbilling/demonstration/picket line conduct at Rhone-Poulenc's main gate on September 17, 1989

As of September 17, 1989, Rhone-Poulenc had a shift change at 5:30 p.m. Kilburn received a phone call at his home on Sunday, September 17, 1989, about 6 p.m. reporting picketing was occurring at the plant's main gate. Upon his arrival at the plant, Kilburn observed there were approximately 150 pickets in front of the plant. He recounts picketing lasted there until about 7 p.m. Video evidence (R. Exh. 107) reflects a considerably diminished number by that time. More individuals stand along the roadside north of Route 25 than appear in the median. Kilburn acknowledged the (closest) pickets were standing in the median strip extending east for about 200 feet handing literature out, and he did not recall if there were any demonstrations on the road's southside that day. On earlier occasion Kilburn had acknowledged the pickets did not approach Rhone-Poulenc's main gate entrance at all that day. Those who stood with signs (generally) stood north of Route 25, displaying the signs along the side of the road to passing motorists, driving west.

There is a stoplight, however, right in front of the plant and a concrete median strip between the four lanes of the road *on the right side* of the main gate entrance, where Rhone-Poulenc traffic will turn left (cross an east double lane) into the main gate area. As people would pull up and stop at the light before turning in, the pickets/handbillers would hand literature to them, as well as to other people (the general public) driving by. Some pickets were standing on the concrete median east of the light. Some were in the highway, going in between the cars (handing out the literature). That was the closest any of them came to the main gate that day.

There was no picketing elsewhere that day. I find they were not in the main gate (exit/entry), nor standing along Rhone-Poulenc's fence (west or east) at all that day. It appears on this first day demonstrator/pickets had acted more as handbillers/information pickets with some in the road passing out literature to both Rhone-Poulenc employees entering the plant and the passing public. Though not recalling it at first, on review of his notes, Kilburn then related there were signs in use in this first day of contended picketing that said, ''Brown & Root go home'' and ''Rudy Shomo lies.'' Employer contends that the signs were directed at Rhone-Poulenc employees who were entering. (There were safety signs in use.)

The initial leaflet distributed on September 17, 1989 (R. Exh. 108)

The first of two leaflets early distributed was passed out on September 17, 1989. The first leaflet is one unidentified on its face explicitly as to source. Content and point of distribution leaves little doubt, as Employer has urged, that it was directed at Rhone-Poulenc (and Union Carbide) and Rhone-Poulenc (and Union Carbide) workers using the main gate as well as the general public. Message content appears more inferable as in source from IAM, or for IAM-represented employees working there. The first leaflet states:

> Rhone-Poulenc and Union Carbide are taking one more step to push our union back. RP has multi-craft. They have a two-tier wage system in the IAM. They are eliminating 150 jobs. Now they want to expand the number of nonunion contractors in the plant. Despite the massive profits made by both Union Carbide and Rhone-Poulenc over the last few years, they are not satisfied. They are pushing harder for a union free environment at the Institute plant. That is why Brown and Root is here!
>
> Carbide and RP are taking aim at both the IAM and the building trades unions. More work that is contracted out—and contracted out nonunion means greater control over wages, working conditions and health benefits for RP and Carbide. The plant owners call it ''improved productivity.'' But we know ''improved productivity'' means fewer jobs, lower safety standards, and lower wages and benefits.
>
> Non-union workers in the plant will feel the blows aimed at us as well. Just ask the janitorial workers, Carbide construction workers or Professional Maintenance workers (who have now joined the IAM). All have had their wages cut! The fact is that all workers at the Institute plant have a stake in driving Brown and Root out!
>
> Safety is a key issue here. Brown and Root's dismal record of safety violations and bribery of inspectors is a threat not only to those of us who work in the plant (including Brown & Root's employees) but to the communities surrounding the plant.
>
> We can't take this lying down! We must organize and mobilize.
>
> EVENT CALENDAR
>
> THURSDAY, SEPT. 21—GATHER AT DUNBAR COMMUNITY CENTER AT 5:00 PM. FOR LITERATURE DISTRIBUTION TO AREA COMMUNITIES.
>
> FRIDAY, SEPT. 22—RALLY WITH AREA UNIONS AT RP MAIN GATE AT 4:00 PM.
>
> SUNDAY, SEPT. 24—ATTEND ORGANIZATION MEETING AT 3:00 p.m AT TEAMSTERS HALL ON MACCORKLE AVE., KANAWHA CITY.

(The above parenthetical reference to including Brown & Root employees in the stated safety concerns is in the leaflet.)

Although this leaflet is unidentified on its face as to originator, message content more suggests an IAM union source to its represented and to unrepresented Rhone-Poulenc and Union Carbide employees, than SAFE message to them. Bobby Thompson deposed, however, *he had participated in a decision by SAFE to schedule a rally for Friday, September 22, 1989, which was to be conducted by area unions at Rhone-Poulenc's main gate*. Thompson deposed he had participated probably in most of SAFE's decisions to organize demonstrations or picketing at the Rhone-Poulenc plant. SAFE's Bobby Thompson was at least a contributor.

To the extent Employer in brief has in part argued that safety was not a real concern in this leaflet, because it was treated only at the end of the leaflet and then in an urged unmeaningful way, I find that contention is not only erroneous (see second paragraph reference above) but any such claim viewed against the content of the last paragraph and the context in which it arose warrants rejection. The leaflet does identify both IAM *and* the building trades unions, but

as joint targets of Rhone-Poulenc's and Union Carbide's actions, which have included job eliminations. Though some of the jobs eliminated arguably appear reported lost separate from Brown & Root's arrival, other job loss inclusion increases likelihood originating source was in some such manner related jointly to the IAM and the local building trades.

Employer argues this first handbill initially distributed by pickets on September 17, 1989, had a blatantly secondary message directed to Rhone-Poulenc employees, namely, that the pickets had a dispute with Rhone-Poulenc and Union Carbide over Rhone-Poulenc's selection of a nonunion contractor Brown & Root. Charging Party Boilermakers International contracontends the record evidence shows there were others present besides Boilermakers or the building trades. Those present included not only environmentalists and members of the public concerned about safety, but also Rhone-Poulenc's own employees. (Kilburn has not denied that some of Rhone-Poulenc employees were present that Sunday.)

Employer has argued the pickets' own words (presumably, ''The fact is that all workers at the Institute plant have a stake in driving Brown and Root out!'') declare their secondary object. It would appear only safety threat is extended in coverage to Brown & Root employees, though the call to action is one for mobilization and organization.

Moreover, it is apparent from the record, irrespective of other group unit being involved in handbilling on joined safety concerns, there were building trades members there. There is no question Bobby Thompson was soon thereafter addressing the same safety issues, prominently in the name of SAFE, and this time clearly in association with picketing, though not picketing ever involving a patrol of Rhone-Poulenc's main gate.

5. The picketing, signs, and leaflets in use on September 18, 1989, and certain related events

On the next day, September 18, 1989, Kilburn arrived at 5 a.m. When he first arrived, approximately 25–35 pickets were there. He initially related some were in the median, handing out literature, and some (undisclosed number) were at the main gate. On cross-examination Kilburn clarified that when he arrived at 5 a.m., the demonstrators who handed out literature were not there yet. The same signs were present. Kilburn recalls (Monday) traffic was heavy, and Kilburn asserts pickets were at this time interfering with traffic. When the state police arrived, they asked the pickets to get out of the roadway. (Kilburn on other occasion explained under West Virginia law you cannot stand on the median. When law enforcement arrived, they would ask those handbilling there to move. Whenever those handbilling were asked to move, they always did, and they were never arrested. But the handbillers would always come back.)

Employer asserts what is otherwise notable this day is that state police had called a wrecker to tow away a vehicle that was across (on north side of) the road from the main gate entrance. After Bobby Thompson spoke to the trooper, however, the car was not towed away. Video evidence submitted shows the Trooper's attentive to a car, Thompson's presence, and a driver timely entering the car (presumably) to move it off the traveled road. There is no question on this record that when present, Bobby Thompson directed the picketing.

At about 5:45 a.m. that day, Kilburn was at the contractors' lot (located behind gates C and A). Kilburn recounts on this occasion individuals had pulled in and blocked gates. First, Kilburn acknowledged generally that the pickets regularly parked their cars on the northside of Route 25. Kilburn otherwise relates on this day an individual (with two passengers) had pulled in the road's southside and blocked gate A that said, ''Nonunion contractors'' (but which Rhone-Poulenc intended for nonunion contractors *other* than Brown & Root). The individual, a large man, with a big bushy beard, whom Kilburn (later) identified as Tommy Thompson, told Kilburn he was looking for a job with Brown & Root and wanted to know where their gate was. Kilburn told the man it was behind him. Kilburn acknowledged on cross-examination that while he was there, no one was trying to get in, but he continued had there been at the time, the truck would have blocked passage. Kilburn acknowledged the truck in front of gate A was there for 4 minutes at the most.

Kilburn relates when Tommy Thompson left, he first went to the main gate where Kilburn saw Tommy Thompson talk to some of the pickets there. Kilburn next saw Thompson return to the contractors gate. Picketing ended at 7:30 a.m. at the main gate. By that time all of the Rhone-Poulenc employees should be on the job. Kilburn has testified credibly there were pickets at all gates that day, handing out the leaflets (considered above and below).

Kilburn recalled that just as Tommy Thompson was (initially) leaving (to go to the main gate) another vehicle arrived and this one blocked gate B (the union contractors gate). It was Fisher. Kilburn then walked up and spoke to Fisher. From tone of voice and loudness, Kilburn concluded Fisher was upset. *Fisher cussed Rudy Shomo and Rhone-Polenc for bringing Brown & Root in here, and Fisher said that Rudy Shomo lied to him*. Kilburn asked Fisher to remove his car from in front of the gate (B union contractors), and Fisher *promptly* did. Fisher also went to the main gate, where he also talked to some of the pickets. Fisher then went back to gates A, B, and C where Kilburn asserts he saw Fisher directing people, that is positioning people where to stand, to hand out the literature. All gates were handbilled that day.

The first Bobby Thompson SAFE leaflet (R. Exh. 109)

Kilburn testified a second handbill was distributed by pickets starting September 18, 1989. Employer asserts it also carried an unlawful, secondary message in that it urged Rhone-Poulenc employees and the public to pressure Rhone-Poulenc with telephone calls demanding that Rhone-Poulenc fire the nonunion Brown & Root and replace that company with union contractors employing union workers. This leaflet (in red) is clearly identified as a SAFE leaflet produced by Bobby Thompson, thus: ''This 'DANGER!' Bulletin was produced By 'Safety and Fair Employment' (SAFE), Bobby Thompson, Chairman.'' It states:

DANGER!

To Our Health
To Our Community
To Our Jobs

These are perils facing the Kanawha Valley today. Perils created by Rhone Poulenc at Institute, makers of the deadly MIC chemical. Remember Bhopal!

Rhone-Poulenc has just hired an out-of-state contractor—Brown & Root—to replace its high quality West Virginia union construction workers with mostly imported, poor quality, non-union workers.

Consider this from the Fort Worth, Texas, *Morning Star-Telegram* about Brown and Root's problems on the Comanche Peak nuclear power plant.

They have ranged from extensive faulty welding on pipes designed to carry radioactive liquids to a 2-inch-wide crack across the concrete base for Unit 1 reactor . . . . Condensers worth $40 million were damaged when workers sledgehammered tubes into place.

Protective coatings applied to the inside of the reactor building were deemed to be almost useless because workmanship was so bad . . . . Two hundred electrical installations are being replaced . . . because seals were unacceptable . . . .

HELP US FIGHT FOR YOU!

Let Rhone-Poulenc know you want to protect our health, our community, our jobs. Call (747–6000) or write. Tell them to hire back its quality West Virginia union workers. Your neighbors. They care for you and your safety. [Emphasis shown as urged by Employer.]

It is uncontested that the phone number displayed in the leaflet was that of Rhone-Poulenc's main switchboard. Bobby Thompson otherwise deposed he had nothing to do with a CWA (Communications Workers of America) hotline dispersal of SAFE information. (See CWA hotline discussion below.) Thompson deposed there are no positions in SAFE, beyond the ones he had earlier stated he and Reverend Paul Gilmer held as SAFE cochairmen. (But see Employer's contention that Thompson organized SAFE, below.) McCormick and Thomas early supported SAFE. Thompson deposed that as far as he knew, Thomas did not hold any official position with SAFE. Neither did McCormick, who attended only some meetings.

6. Local 667's calls upon Boilermakers members to submit applications for employment with Brown & Root and the voluntary union organizer submissions that began September 19, 1989

a. *In general*

Many applicants have testified (below), and McCormick acknowledged that we (Local 667) had people make an application at Brown & Root (in September 1989); McCormick confirms we had them put on their application they were Boilermakers organizers; and McCormick asserts, ''[W]e just started an organizing campaign.'' The Boilermakers members' substantial application submission at this critical time, matching job startup, and applicants' identification of themselves as volunteer union organizers are shown by the great weight of mutually consistent and credible testimony of individual applicants (considered below).

According to Thomas, it was a day or so after Charleston Building Trades' meeting held at the Teamsters' union hall on September 17 that Thomas and some other members of Boilermaker's Union Local 667 were at Boilermakers Local 667's union hall. Thomas adds, ''We had heard about this organizing campaign. That it was time to go down and pursue it, put in our applications and do as we had been instructed before, to put volunteer organizer on our applications.'' He testified that on September 19, 1989, he put in an application to Brown & Root to work at the Rhone-Poulenc job, and Thomas recalled he took several other Boilermakers union (Local 667) members with him to the applications site (Job Service), who did the same.

Thomas, and as many as five other Boilermaker Local 667 applicants, filed applications with Brown & Root on September 19, 1989. Indeed, 46 of the 48 Boilermakers applicants named in the complaint did so on or before September 25, 1989, and 40 of those had obtained a copy of their Brown & Root application and returned it to the Union as requested (G.C. Exh. 7 series, below). Thomas had initially indicated that he had kept a list (G.C. Exh. 6(a)) of those doing so in his own handwriting. Then he related (ambiguously) in some cases employees who turned in an application had signed the list. Thomas next acknowledged it was not necessarily in every case, the one who gave him a copy of an application, who signed the list. In the end, Thomas has (and then the more persuasively) testified that the lists (G.C. Exhs. 6(a) and (b)) represented his own best estimate of those who had said they had turned in an application based on a combination of several such sources.

The Union's copies of the applications turned in to it, kept in the manner Thomas has related, is argued to be some evidence that the named applicants had obtained a copy of their application and turned it into the Union as requested by the Union. The applications maintained by the Union in that regard support finding the applicants had turned in an application for employment with Brown & Root, a copy of which was supplied the Union by the individual in pursuance of prior union request that it be done.

The General Counsel and Charging Party Boilermakers International additionally have argued not only that the applications (copies) thus received by the Union are admissible, but that the lists (G.C. Exhs. 6(a) and (b)) are corroborative evidence of the names of those who had submitted the originals of the above applications to Brown & Root (G.C. Exh. 7 series), as well as others named on the list who reported they did so, though they did not turn in a copy of their application to the Union (for whatever reason). The urging is made under prior Board holding allowing receipt of all applications obtained by the Union, where there is adequate general authentication on certain applications, and there is no evidence of forgery or completion of an application by an interested party other than the applicant, as it is urged was allowed in *Alexander's Restaurant & Lounge*, 228 NLRB 165 fn. 1, 168 fn. 6 (1977). Employer disputes propriety of application of the evidentiary ruling of *Alexander's Restaurant* case to facts that are presented here.

Although I tend to agree with the General Counsel and Charging Party Boilermakers International that circumstances described above appear to be more encompassed within the *Alexander's Restaurant* case holding, than not, such as to make the Union obtained applications, and support the Union's (in effect) more encompassing business lists kept of those reporting they had done so, competent as having some probative value on (tending to prove) the material issues, the matter is really rendered more a moot one as (sole) proof of applications actually filed with Employer in this case, for there is other, and much more direct, comprehensive, and wholly convincing evidence of record on that, the applicants' corroborative testimony.

Thus, I find that Thomas had turned in his own application to Brown & Root at appropriate West Virginia Employment Commission (Job Service) on September 19, 1989, and that other applicants did so on that, and on succeeding dates, as shown by their direct testimonial evidence below. I further find Thomas and by far most other (of the 48) complaint named boilermakers member-applicants were interviewed by Johnson, and though it appears few were interviewed only by a Job Service agent in screening process ascribed to by Employer, and 1 not shown interviewed at all, all but 4 applications were in Brown & Root's possession as applicants for employment, and all 48 applicants had filed applications on the specific dates and in manner shown below, at McCormick's, Bush's, and (albeit in much more limited part) Thomas' authorized requests. The action taken was clearly on Business Manager McCormick's call.

b. *Boilermakers International's and Local 667's statements on the submission of Brown & Root applications*

The record reveals that the constitution of the International Brotherhood of Boilermakers' article XVII, section 1(t), page 65, pertinently provides:

> No member shall accept employment with a non-Union contractor without prior written approval by the Business Manager, or where there is no Business Manager, by the President of the Local lodge having the jurisdiction over the territory.

Boilermakers Local 667's current (but not then) President George Pinkerman has testified relatedly that the constitution requires McCormick's permission to work, but not for a boilermaker member to apply. Boilermakers International's president would be the one to interpret Union's constitution in that manner. Pinkerman describes his understanding of Boilermakers Local 667's practice.

Director of Organization Jones testified the Boilermakers International president has interpreted this provision, and the president has set the policy on it that they follow. Though Jones testified he has not seen the president's interpretation set forth in writing, Jones did testify, *the policy is, a member of our Union may make application to a targeted nonunion contractor's jobsite. On gaining employment with that nonunion employer, the union member will then contact the Local's business manager, and the Local's business manager will give written authorization for the member to continue working on that project for the purpose of organizing*. Jones testified that the members who attended the fight back seminar were given that information as a part of the members' awareness program covered in the seminar. Jones testified explicitly that attendees were told that by him in the February 1989 seminar. Jones observed that other members may get their knowledge of it from discussions at the hall.

c. *No written Local 667 notice or approval*

There appears no internal Local 667 written mention of this specific fight back action implementation, not as prospective Local action in the minutes of the September 9 executive board, or Local 667 meeting, nor is there mention of it (retrospectively) in the October 14, 1989 executive board or Local 667 minutes.

There is mention in the October 14, 1989 Local 667 minutes of Fisher's (below) September 29, 1989 letter to all affiliated locals throughout the State ''to help finance the campaign against Brown & Root, the non-union contractor who has been awarded a three year construction and maintenance contract at Rhone-Poulenc plant, Institute, WV.'' Local 667 members were in meeting of October 14, 1989 (R. Exh. 43), further advised:

> Bus. Mgr. McCormick advised the Body that a serious fight back effort must be waged. In meeting with the planning committee of the Building Trades and other interested parties it is generally agreed to approach this resistance from a safety standpoint and get the general public involved. This will be done with demonstrations, radio, TV, and newspaper advertisements as time progresses. The cost may run up to $50,000. He urges everyone to contribute what they can to help. We must head off Brown & Root at Institute. He expresses appreciation to the members who have supported the resistance. Plans are being made to get boilermakers wives and other ladies involved in the demonstrations.
>
> . . . .
>
> Bus. Mgr. McCormick expressed appreciation again to the members for helping on the Brown & Root problem at Institute. Many have come from all over the State to help. Many members present expressed their concerns and willingness to help whenever they can to stop Brown & Root at Institute.

d. *McCormick's account*

McCormick, who related Local 667 covers the State of West Virginia and (apparently) three counties in Ohio (though there is confusion of record thereon), corroborated he told union members (directly, and over the phone) they were starting an organizing campaign at Brown & Root, and that *he would appreciate it if they would help*, that he generally did tell them to put on Brown & Root applications they were (Local 667) ''voluntary union organizer,'' and also that if they did get hired, to do their job, and we'll start organizing.

McCormick has explicitly denied the intent of telling the members to put ''voluntary organizer'' on their applications was so the Employer would then have to reject the application. Clearly strained, however, is McCormick's assertion he thought doing so would have no effect. Putting Boilermakers Local 667 volunteer organizer, or words to that effect, on an application would clearly put Employer on notice the appli-

cant for hire intended to engage in certain organizational activity protected by the Act, on hire, for that Union, a purpose intended by Jones. McCormick has credibly affirmed that he instructed Assistant Business Manager Ron Bush to tell (Local 667) member applicants to Brown & Root the same thing, and that Bush gave out (seemingly instructions to members to do) the same thing, to put the words voluntary, or volunteer union organizer, on their application. McCormick affirmed Thomas was given similar instructions, whether it was directly from McCormick or indirectly from Bush.

McCormick has testified that there was no discussion about coordinating it (i.e., putting volunteer union organizer on the applications) with Charleston Building Trades Council or with any of the Building Trade locals. McCormick's consistent testimony is that this was a Boilermakers Local 667 organizational campaign, proceeding in accordance with Boilermakers International fight back program, as McCormick understood it. McCormick also testified a plan for concurrent picketing was not a part of the fight back seminar in February 1989.

McCormick acknowledged that he did not give the members who applied for work at Brown & Root individual instructions concerning what they should do to organize. McCormick testified that that was to be handled by organizers from the Boilermakers International union. A convincing number of witnesses have corroboratively testified it was after they were hired that they were going to organize Brown & Root nonunion employees, and some recalled specifically that they were told that they would receive instructions then (on hire) how to do so. But even more notable, every applicant of whom inquiry was made expressed basic understanding they would talk to fellow employees about their perceptions on the benefits of the Union, on their own time, and not companytime. When asked why McCormick told the local Boilermakers' applicants to put ''voluntary organizer'' on their job applications, McCormick stated, consistent with a Yakomowicz instruction (and with others report thereon), he did it because ''We didn't want to hide anything. We wanted them to know that we were going to organize.'' That McCormick (or others at his direction) did so is corroborated by mutually consistent testimony of a number of the named applicants.

e. *Thomas' applicant status—interview on September 19, 1989*

The complaint allegation as to Thomas is withdrawn. Though Employer contends for it (in support of other account), on this record I do not find that Thomas was at any material time a Local 667 paid organizing agent (for the reasons discussed in detail below). Even were it to be determined otherwise, however, in addition to observing the legal foundation predicate that ''[t]he right to organize is at the core of the purpose for which the statute was enacted.'' *Sunland Construction Co*., 309 NLRB 1224, 1229 (1992); the Board has also said it will not presume intended misconduct of paid union organizers, id. at 1230. The Board has in that regard stated:

> In the absence of objective evidence . . . we will not infer a disabling conflict or presume that, if hired paid union organizers will engage in activities inimical to the employer's operations.

Thomas testified that he had personally asked some members of Boilermakers Local 667 to apply at Brown & Root. Moreover Thomas confirmed that he had told the members who were going to turn in applications, to put ''Boilermakers Union Local 667 organizer'' or ''voluntary organizer'' on their applications. Thomas wrote on the back of his own Brown & Root application form ''Boilermaker Local 667 Volunteer Organizer.'' Thomas told them to be truthful when they filled out their applications. Thomas also told them, if they could, they were to get a copy of the application once they had turned it in. Most did, though Thomas personally did not. (Contrary to any Employer urging, Thomas has sufficiently established that Frye, L. Johnson, G. Mosteller, G. Walker, and Webb, filed applications on the same day he did, and that they provided a copy of their applications to him, or the Union (and see G.C. Exh. 6(a).)

It is also clear, however, and I find that most of those applying applied other than at Thomas' request (see supportive testimony of applicants below). I further find application process at this time was begun essentially pursuant to common direction of the Boilermakers Local 667 Business Manager McCormick while operating under the constitution within this area. It coincided (I find) with startup of the work at the Brown & Root jobsite, a concurrently initiated (and so described) fight back campaign by Charleston Building Trades Council, inaugurated SAFE activity; with both supported by Boilermakers Local 667, and otherwise in local circumstances where many skilled building tradesmen were out of work, expressed concern with Brown & Root's safety record, and Boilermakers Local 667 members-applicants actively sought employment with Brown & Root in an implementation of Boilermakers International's fight back program (below).

Thomas turned in his application to work for Brown & Root on September 19, 1989, and he was apparently the first of his group to do so. Thomas recalled that he was briefly interviewed by a representative of Job Service. This man (essentially) told Thomas that he was glad to see people like Thomas coming in with their qualifications because he was worried about finding people to supply Brown & Root's employment needs. Thomas' application was then taken back to Brown & Root's Johnson. Johnson then briefly looked over Thomas' application on the front and on the back and said, ''We'll be in touch if we need you.'' When asked explicitly if that was the extent of the interview, Thomas responded, ''It lasted about zilch.''

Thomas testified that when he applied for work at Brown & Root, on his own application under ''past employers'' he had stated his employment history since 1971 to present was by ''Boilermakers Local 667.'' Thomas offered explanation it was a traditional thing that members of craft unions do when they apply for work, because all information on past employers can easily be obtained from the Boilermakers' job referral hall. (Only one other alleged discriminatee Dew, G.C. Exhs. 2(i), 7(H), however, appears to have similarly done so in applying.) The other applicants (but not all, Swisher and Walker) listed varing substantial specifics of their recalled prior employment. Thomas did show under job title and duties section of his application to Brown & Root that he was ''Chairperson for Building & Training Committee.''

f. *The interview of Steven Coon on September 14, 1989, and Employer's claimed animus shown in orientation*

The General Counsel called a former Brown & Root supervisor (and later union employee organizer), Steven Coon, as a witness. The Employer attacks Steven Coon's credibility on this, and on several other matters he has testified to in connection with Lucas events considered in part II on the basis (essentially) that Coon became a disgruntled employee, following Brown & Root's termination of his father, and his own job demotion, and as is contended shown by certain alleged variance in his hearing testimony from prior affidavit supplied as Employer's witness. The General Counsel contends Coon's (present) testimony is credible, and it has further established antiunion animus on the part of the Respondent in its hiring process at this time.

Coon related on direct examination he was hired by Brown & Root in the last part of September 1989. Coon's application, dated September 14, 1989, is in evidence as Charging Party's Exhibit 2. Therein Coon stated his first preference as a crane operator with 15 years' experience. Prior to being hired, Coon was interviewed by Jesse Cowart and Tom Johnson. Coon told both of them in his interview, what his experience was in operating machines, and then he was sent out while his father, Ronald Coon, was interviewed. Employer hired both Coon and his father the same day. Coon was told he was hired as a rigger and ironworker, though Coon testified there was nothing on his application that would indicate he had prior experience as either a rigger or ironworker. Neither Johnson nor Cowart, during Coon's interview, asked Coon if he had been on the picket line (Tr. 961).

Perhaps more significantly, on his first day at work, on October 2, 1989, Coon attended an orientation and safety meeting. Coon recalls that during the course of that meeting, James Thorn, Brown & Root's safety supervisor, and who gave most of the orientation, had said to a group of (new) employees, ''This was not a union company, will not be a union company. If you got any intentions of trying to make us a union company, you can leave now'' (Tr. 962). Coon recalled there were approximately 15 employees in the orientation session when Thorn had made these remarks. Though the incident is admittedly pre-10(b) the General Counsel (correctly) contends Thorn's remarks do constitute further evidence of Employer's antiunion animus, if credited. Thorn denied making the statement, and Employer would fatally fault the General Counsel for not calling any of the other employees who were then in attendance to corroborate Coon. I relatedly observe that Max C. Kennedy is shown to have arrived (the first time) sometime in October (but not on or before October 2) to train Employer's supervisors in regard to their conduct during an organizing campaign, and I observe Thorn's prior experiences with the picket line at this time, below. But, in any event, I simply did not and do not believe Coon has made up this incident, and I am persuaded in this instance that Coon's recollection on this matter is the more reliable, and I credit it.

To extent that Employer has argued pre-10(b) evidence such as the above is not available as proof of Employer's motivation with regard to acts occuring within the 10(b) period, that argument is rejected, *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960). And see *Paramount Cap Mfg. Co.*, 260 F.2d 109, 112–113 (1958), pre-10(b) evidence is serviceable to explain any ''ambiguous and equivocal conduct, including supplying the real reason where an untruthful reason is given for conduct within the 6 month period[,]'' provided independent and controlling weight is not given the pre-10(b) evidence, ''[T]he established judicial rule of evidence [is] that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.'' *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 705 (1948).

g. *The applications generally conceded received by Employer*

The parties have agreed Respondent turned over certain applications in its possession in investigation of this matter (G.C. Exhs. 2(a) through (qq)) and for their admission. The General Counsel observes Respondent thereby effectively acknowledged it had received (at least) 43 out of the 48 applications of the named boilermakers' applicants. Employer in the end has conceded receipt of one more (Cronin). Thus, Employer has acknowledged receipt of 44 applications.

The General Counsel advanced in brief assertion Brown & Root maintained it did not receive applications from the remaining six alleged discriminatees, or, apart from Southall, five individuals (Cronin, Skeens, Swisher, Carl Walker, and Wise). In reply brief, Employer states that it never denied receipt of applications from Cronin, Walker, or Southall. There is conflict, however, over Employer's receipt of four applications.

h. *The four applications whose receipt Employer contests*

Placed in evidence as General Counsel's Exhibits 7(a) through (nn) are copies of 40 applications that were turned back to Thomas, or the Union, as copies of applications placed on file for employment with Brown & Root, and which were turned into the Union, pursuant to member compliance with the Union's request that the Boilermakers member-applicants obtain a copy of the application when they filed their application at Job Service. Although there is substantial overlap of General Counsel's Exhibit 7 series 40 applications, with General Counsel's Exhibit 2 series 43 applications, the series are not the same, nor is one inclusive of the other. When compared with the 48 boilermakers named in complaint, there are application ommisions in each series exhibit. Employer, however, has placed in issue only four applications as not received by it.

Ralph Southall. There is no question Employer had acknowledged not only the receipt of an application from Southall (G.C. Exh. 18), but a later process of it, until Southall was denied employment for medical reasons that made him unfit for a job (for another company) for which he was being considered in the summer of 1990 (to be discussed further in part III). There does not appear to have been consideration of it for any job at Brown & Root's Rhone-Poulenc job for which he had initially applied. But by that time Johnson had interviewed well over 500 Brown & Root applicants, and there were more than a thousand applications for employment by Brown & Root on file at Job Service.

Jeffrey Cronin. The record reveals that when Johnson called Job Service on Cronin (Johnson admitted) he was informed that Job Service records had shown the application of Cronin was listed as referred to Johnson. Though Employer did not submit an application for Cronin (as for other applicants in G.C. Exh. 2 series), Employer in the end does not dispute receipt of an application from Cronin. With Employer's accession of its receipt, and Cronin's confirming testimony, I find General Counsel's Exhibit 7G is a copy of Cronin's Brown & Root application.

Johnson denied receiving applications from Job Service for three individuals, namely: *James R. Skeens*, *Gary Swisher*, and *Mike Wise* (and it would seem *Carl A. Walker*), but not that Job Service had them. (The Employer has never denied receipt of an application for Garrett Walker, G.C. Exh. 2(nn).) Johnson testified after he received the instant charges, he first looked through his own files, and did not find applications for these four. Johnson then called Sam Rayhill, whom Johnson descibed as a supervisory type, who was assigned (essentially) to service Brown & Root's recruitment needs, and with whom Johnson usually dealt at Job Service. Johnson inquired of Rahill about these four applications.

Gary Swisher. Employer contends that Gary Swisher never testified that he wanted a job or had any personal interest in an employment with Brown & Root. Swisher lives in Shinnston, West Virginia, which is about 135 miles north of Charleston. Swisher testified that a boilermaker named Keith Andrews brought his *Brown & Root* application down to the Job Service for him. Swisher affirmed that he signed his application on November 22, 1989, thus well after it was known by the Union that though the Employer (or, in a few instances, the Job Service it used) had all but the last 2 of the above 48 named boilermakers' applications in its (their) possession, Employer had steadfastedly refused to employ any of the above-named Boilermaker Local 667 applicants, who had earlier declared themselves as volunteer union organizers.

Swisher initially recalled that when he had filled out his Brown & Root application, he had just finished a job at the Fort Martin power station at Morgantown (below), West Virginia, and that he was then unemployed. Swisher, however, later clarified with recollection that actually he was on the last day of the (Fort Martin) job when he filled out the application and when he had Andrews bring it down to the Job Service for him. Swisher acknowledged that he did not state his previous employment on his application, but testified that he had filled out that he had been a welder for 22 years, and as he was a boilermaker, he had just figured that was (adequately stated) experience. It would appear that similar statement of experience has been found by the Board heretofore to be essentially an adequate presentment in a prima facie case, *AJS Electric*, 310 NLRB 121 (1993).

Employer next observes, Swisher admits that he never gave the application to Brown & Root, but had given it to Andrews whom he only assumed brought it to the Job Service, and Swisher acceded he never called Brown & Root thereafter to find out anything about the job. Johnson has relatedly testified he did not have an application for Swisher in his files. Swisher identified General Counsel's Exhibit 7(hh) as (a copy of) his *Brown & Root* application that he filled out for employment with Brown & Root, and which he has confirmed that he signed on November 22, 1989. Employer does not dispute that Job Service had this application, but has only effectively stated its nonreceipt of Swisher's Brown & Root application.

By this time the Respondent Employer had long decided not to hire any applicant who declared on an application form that he or she was a voluntary organizer for Boilermakers Local 667, as Swisher had now done, with the play out of his current job. Though Johnson asserts he did not recall if he had told Job Service that, it seems highly unlikely to me he would not have informed the individual that was proccessing all Brown & Root application forms for him of Employer's now determined policy not to hire any applicant who had the words Boilermakers Local 667 volunteer union organizer (or words to that effect) on their applications.

Moreover, on this occasion I observed one of the rare occasions that Johnson exhibited unsureness if not uneasiness in his testimony, when Johnson first related he believed that Rayhill had told Johnson that they had not referred Swisher's application to Johnson. (In contrast, 22 years of welding experience that Swisher had declared on the face of his application would straightly meet Employer's 4-year journeyman qualifications, and surely qualify him for at least an interview, under the standard that Brown & Root had passed on to Job Service as what Brown & Root normally desired for welders.) It surely as well called for a nondiscriminatory on-call interview, if that was procedure then being followed, as Johnson has acknowledged it probably then was. After a view of his prior affidavit, given closer to the event, Johnson then related Rayhill had (more limitedly) told Johnson that Job Service had no record of referring Swisher's application to him.

Employer does not deny that Job Service had the Brown & Root application from Swisher (notably dated November 22, 1989), thus at a time when Johnson was still interviewing at Job Service, including some applicants whom Johnson has acknowledged probably were brought there on call for his interview. Swisher unquestionably had qualifying experience for such an arranged interview, and he has testified that if Brown & Root had called him, he would have taken the job. In my view it is reasonably shown that Swisher filed a bona fide application with Job Service that Employer did not have processed.

James R. Skeens. Employer did not advertise employment opportunities (as such) in newspapers, radio, TV, etc., and apart from its employment of certain Brown & Root employees whom it employed, or who were employed formerly elsewhere, Employer, with certain claimed ''political'' exceptions to be noted later, has used the Job Service exclusively to supply it with a pool of job applicants to meet Brown & Root's needs for local craft and helper employees. Johnson has denied only having received Skeen's application.

The Employer has acknowledged General Counsel's Exhibit 7FF is an application by Skeens for employment with Brown & Root, but observes that it is on WVA Job Service form, and Johnson denied he ever received a Job Service form. Employer correctly observed that there is no evidence the Job Service form was provided to Brown & Root, nor that Skeens had filled out a Brown & Root employment application.

General Counsel's Exhibit 7FF, however, is a copy of a Job Service employment form for Skeens that contains handwritten identification as being an application for Brown &

Root, that Skeens did not put on there. Skeens wrote on his Job Service form, ''Boilermaker Local #667 volunteer organizer.'' Johnson has stated that when he called the Job Service on Skeens, Job Service told Johnson that though they had Skeens listed, he was not listed as being referred to the Employer. Johnson has thus confirmed that he did not have nor had he received an application from Skeens, and his supportive recollection is that he did not receive any Job Service application forms. Employer alternatively contends in reply brief, since James Skeens wrote on his application that the minimum hourly wage that he would accept was $17.01 (the Boilermakers' rate at that time), clearly Skeens was not interested in an employment on Brown & Root's terms. But the latter argument (at best) has only surface allure, and (at worst) in Employer's own account appears fairly clearly afterthought and pretextual.

Skeens application does not bear a date, nor did Skeens recall the date that he applied. *Skeens had driven to the Job Service by himself to seek employment with Brown & Root*, and though there was a group there when he arrived, some of whom he recognized from seeing them at the union hall, he has asserted that he did not know their names. Be that as it may, others more persuasively have corroborated that Skeens was there. Skeens recalled that the day he was at Job Service, they were interviewing in the back, but he was told by a man there that they were only interviewing certified welders that day.

What is made rather clear to me from all the above evidence presented on Skeens, including Johnson testimony that he had *never* received a Skeens' (or any Job Service's) application, is that the minimum wage that Skeens had entered on the Job Service form (or any others did) was not considered by Employer in any material time. Moreover there is no showing that an applicant's statement of a minimum rate desired on a Job Service form ever disqualified an applicant from receiving an interview. Johnson never saw the Job Service forms.

As to indicated minimum amount that Skeens would work for at Brown & Root, Skeens has testified that *he had previously worked at 90-percent scale*, and he knew at the time he applied that Brown & Root was paying less than scale. Moreover, the form Skeens filled out was a Job Service form, and he was not provided with a Brown & Root form (for undisclosed reason), that, as far as is evidenced on this record, there is warrant to conclude he would have filled out otherwise. Skeens was not told he was being denied an opportunity to fill out the Brown & Root application form and interview, because of his designated minimum wage, but informed only that welders were being interviewed that day. There was no apparent inquiry made on Brown & Root form as to minimum wage required. Indeed, many had otherwise put on their application the same rate of pay as paid in last employment, which did not prevent their interview, nor interrupt their application process. Some other consideration was at play.

The Job Service form in evidence does not reflect Skeens' work experience. (But this is more likely a simple result of an incomplete exhibit duplication.) Compare one-page Skeens' Job Service application (G.C. Exh. 7FF), and other three-page Job Service forms (G.C. Exhs. 7P and U) in evidence (and as discussed below.) In any event, Skeens applied (I find) September 21, 1989, after Johnson had reported to his superior 2 days' earlier, on ''volunteer union organizer'' applications that were first received September 19, 1989. Unlike Skeens, the only two other applicants of those named in the complaint for whom Job Service forms are in evidence (Michael Haught and Andrew Lowther) did not state on their Job Service application that $17.01 was a minimum wage they would find acceptable. Rather both had left that section blank. Perhaps even more notable, both were given a Brown & Root application (which they both have filled out), even though Haught (only) had declared on his Job Service form that he was a Boilermakers Local 667 volunter organizer, and applied later on September 25, 1989.

Haught's Brown & Root application completed after the Job Service interview shows Haught had 12 years of pipefitter work experience and also 6 months' foreman experience. Lowther's Brown & Root application shows 3 years of supervision experience, and 12 years of pipefitting experience. (Compare G.C. Exhs. 7P and U, respectively.) Haught and Lowther both filed their applications on September 25, 1989, while Skeens filed his 4 days earlier on September 21, 1989. The evidence presented supports an interrupted process made by the Job Service on September 21, 1989, one not thereafter resumed.

The Job Service agent who handled Skeens' Job Service application and who did not provide him with a Brown & Root application was not called as a witness. Though no adverse inference appears warranted to be drawn from that, Skeens did testify on their discourse, and I credit Skeens in that regard. Skeens is a boilermaker by trade, but his primary work experience and skill is in rigging, though he has done (lesser skilled) plate welding.

In that regard, Skeens candidly acknowledged that his welding skill was limited, and (at least) as he understood it, Brown & Root (at that time) had wanted qualified tube welders. Although his Job Service form does not appear to indicate what boilermaker job skills Skeens had, or that he was applying for, I credit Skeens that he had discussed his work experience in his first (and only) interview, that I find was by a Job Service employee. I further conclude and find, on the weight of more credible evidence, that Skeens was an applicant that was screened by the Job Service from present interview on the basis he was not a welder for immediate review, but not on basis he was being disqualified from any other employment on that account. If anything, the writing on his Job Service form that it was a Brown & Root application more suggests the Job Service had simply run out of Brown & Root applications.

Skeens was an identified Brown & Root job applicant who, though Skeens apparently did not have the desired welding experience, to qualify as a welder, on the other hand, had made known that he was a boilermaker by trade and had substantial rigging experience (at a time when Brown & Root was admittedly just creating a pool of crafts and helpers, and at a time when Johnson kept the Job Service informed of Employer's needs). *But he was also one who had declared at the top of his Job Service form he was a ''Boilermaker Local #667 Volunteer Organizer''* as all the others had. The fact is, that he was not given a Brown & Root application to fill out, nor was he arranged for later interview, and he was not hired. I am persuaded that the General Counsel has made out a prima facie case that Skeens was not hired in substantial part because Skeens had stated

on his application that he was a volunteer union organizer, and because Employer determined (below) that it was not going to consider for hire or hire any applicant who did that, and because it is only the more likely Job Service was so informed.

Carl A. Walker. Employer contends that Carl A. Walker was still employed (by another company) when he received his application, and also Walker never testified he had any personal interest in employment with Brown & Root.

Walker identified his Brown & Root application (G.C. Exh. 7JJ). Walker has testified a friend of his, Keith Andrews, had given it to him at a job (Fort Martin Power Station) in Morgantown, West Virginia. Walker could not recall the number of days that job lasted after that, but *he knew it was coming to an end*. The circumstances as Walker recalled them were that at the time Andrews was filling a Brown & Root application out, and Andrews asked Carl Walker if he wanted to fill one out. Walker saw that Andrews had some, and Walker asked for one and filled it out, and Walker gave it back to Andrews. Although Walker could not recall if Andrews told him what he was going to do with it, Walker assumed that Andrews was going to submit it to whoever was hiring, that being Brown & Root. (It was a Brown & Root employment application form that Walker filled out on November 23, 1989.) Walker also testified that if Brown & Root had called him, he would have gone (to work) there.

Walker was not sure who told him to put ''Volunteer Union Organizer for Boilermakers Local 667'' on his application form but he acknowledged that he did it there for the first time. Since Walker had not attended a fight back seminar, and since he testified (plausibly) that McCormick had not asked him to fill out the application, I am persuaded it was more likely Andrews who did, when Andrews gave him the Brown & Root application, but I have no doubt that the direction, as with all the others, was with Local 667's origin.

Walker did not put his prior employers down on his application, and could not explain why he did not. Walker, however, did put down he was a boilermaker with 13 years' experience, and Walker did show on his Brown & Root application that he had attended 4 years' college in industrial arts. Walker confirmed that he signed his Brown & Root application on November 23, 1989. Contrary to Employer, I conclude Walker, as Swisher before him, was a bona fide applicant, especially where he declares sufficient qualification on application for an arranged interview, and as being interested in being employed ''Now.''

Michael Wise. Wise testified he worked in and out of here (Local 667) as a visitor, known as a boomer in the craft. Wise descibed himself as mechanic, or welders helper, or laborer, who had done fitting work. Wise testified that he had asked McCormick and Bush if it was all right if he put it (an application) in *so he could work where he lived*. According to Wise, they said there would be no problem, and to get a copy and they will put it here at the hall. Wise went down and applied the same day.

Wise recalls when he arrived at the Job Service he told the receptionist that he was there to file an application for Brown & Root. The receptionist gave him a Job Service employment form which he first filled out. Then his name was called and he went for an interview with an individual (as he related) in a 5-by-5 foot, and 5-foot high partitioned cubicle, where (in the end), he recalled and testified that he also filled out a Brown & Root application.

Wise has testified he also put *volunteer union organizer* at the top of his Brown & Root application, and he confirms, as others do, that he was asked by the union hall to put it on there. Indeed, Wise relates that his interviewer had asked him why that was on there, and Wise had replied that he was asked (to do so) by the union hall by (sic, in context through) whom he is usually employed when he is working in this area. Wise recalled the interviewer, whom he identified as in the courtroom (Johnson), said that they were only hiring welders. Wise has categorically identified Johnson by sight (though he did not recall him by name) as the individual who had interviewed him in that manner.

Wise testified that he had listed his employment history by employers who do similar work to Brown & Root on his application, but he did not recall the date he applied. Wise, however, recalled that James Hudson (who filed his application on September 21, 1989) was one or two in front of him interviewed. Hudson confirmed Wise was there, and D. Mosteller has not only confirmed that he was there with Wise on September 21, 1989, but also recalled seeing Wise there with an application in his hand that appeared filled out, waiting to see Johnson. I find Wise filled out a Brown & Root application at Job Service on September 21, 1989.

Wise recounted he inquired, ''Well, when are you hiring laborers?'' Wise paraphrased that he was basically then told by the interviewer that they were not going to be hiring—(Wise adding) which ''I took it as me.'' Johnson, however, testified (and I find, the more credibly in this regard) he does not ask or say those things in the interviews that he conducts.

Johnson testified he never tells people what he is hiring before he can offer an individual a job. Johnson relatedly testified, that if he is asked, Johnson will tell an individual only (generally) that Brown & Root is a large industrial construction company, and that *it is possible for Brown & Root to be hiring in all construction crafts, including helpers and laborers*. While I did not find the latter stricture as wholly convincing, I do find that Johnson testified credibly at this time he was mainly just trying to get a pool of applicants together. I also note it was likely either September 21 (Thursday), or September 22 (Friday), Johnson went to see Pribyl on the jobsite with all the volunteer union organizer applications thus far received, for Pribyl's review (below), and he would not be available to conduct interviews there as he normally would be.

Wise has also asserted he was not interviewed by a Job Service employee. Under the system then in place that would appear highly unlikely. Most other applicants claiming interview by Johnson recalled having been interviewed by both, which is supported by the additional observation that the Job Service (materially) gets internal credit only for registered referrals made to Brown & Root and, on that account Job Service initially had an individual Brown & Root applicant, first make out a Job Service form (or register), and a Job Service person only after review and/or interview of the individual as a Job Service applicant, then had Brown & Root applicant fill out a Brown & Root application. The Job Service employee then takes the applicant to Johnson for interview (or on occasion had arranged a later interview for Johnson). Wise also otherwise testified that he has interimly been

back to Job Service, but he did not make inquiry of Brown & Root, figuring if the Employer wanted him, that they would contact him.

According to Johnson, after receiving the charge, and on checking his files, Johnson found that he did not have an application for Wise, and on inquiry of the Job Service, Rayhill informed Johnson that Wise's application was one they still had, and they had not referred it to Johnson. Contrary to Wise's assertion, Johnson has testified he never interviewed Wise, essentially relying on three reasons: (1) he did not have an application from Wise in his files; (2) Rayhill (compatibly) said they still had it and they had not referred it to him; and (3) because Wise described his purported interview by Johnson as taking place in a cubicle that Johnson never used (at least not until the Job Service moved to a new building in December 1989).

In regard to Wise's firm assertion of an interview by Johnson, Johnson further testified that though he is not identical to Rayhill in his appearance, Rayhill and Johnson are of similar age, build, and have about the same hair. Despite Wise's firm recollection of having been interviewed by Johnson, in addition to his specific denials of the statements Wise attributed to him, Johnson has as firmly testified he believed Wise was interviewed by Rayhill, as in this period Johnson had been assigned an enclosed office with walls to the ceiling, which he used.

In the end, in this instance, I credit Johnson's account on the weight of what appears to me to be the more persuasive evidence, and I accordingly find it was not Johnson who interviewed Wise, nor was it he who made an inquiry of Wise why the words ''volunteer union organizer'' were put on his application. But I have no doubt Wise put those words on his application.

In regard to Wise's application the only factual issue that would appear to remain is, what effect (if any) arose from the circumstance that Wise had submitted his application in the form he did (as a volunteer union organizer) to the Job Service for employment by Brown & Root, that was not referred for interview by Johnson, as Johnson (at least) on one occasion has testified was Employer's preference, namely, to have all the applications for Brown & Root employment presented to it. But Wise had been given a Brown & Root application to fill out. Like the others, Wise's application bore on its face that he was a volunteer union organizer, and it was not further processed, like Skeens. Like the others he was not considered for hire or hired.

i. *General Counsel's Exhibit 2 series and General Counsel's Exhibit 7 series compared*

Apart from Southall (from whom Employer not only acknowledges receipt of application, but asserts a nondiscriminatory process of same, to be considered fully below, in part III), and excluding presently from consideration Wise (for whom no application copy is presented in either series), it appears (from the comparison of G.C. Exh. 2 series with G.C. Exh. 7 series) that eight applicants did not turn a copy of their application into the Union, *but it is established that they had to Employer*, namely, Michael Butcher, Paul Cox, Paul Frye, Larry Johnson, Gilmer Mosteller, Raymond Smith, Bill Thomas, and Garrett Walker. Thus, although G. Mosteller has not testified here, it is apparent Employer had received an application from him and, in the absence of any contravening evidence, I find that he was one of the ''most'' applicants with volunteer union organizer, Johnson, interviewed. G. Mosteller's application (G.C. Exh. 2ee) contains on its front page the words ''Volunteer Union Organizer Boilermakers Local 667 Chas W.VA.''

Brown & Root has acceded receipt of an application from all of these eight (as evidenced by their applications found in the company agreed G.C. Exh. 2 series). The names of all eight (nine, including Wise) do appear corroboratively on the Union's lists (G.C. Exhs. 6(a) and (b)), of those recorded as having submitted applications to Brown & Root, as kept by Thomas and/or by the Union in manner noted above. Not only does Wise's name appear as the 6th name on the list of 18 names of individuals recorded by Thomas (or signed in otherwise) at Local 667's office on September 21, 1989 (and to record they had filed application with Brown & Root that day), but as noted, Wise has the more significantly personally testified he filed an application, he was interviewed, and he filled out a Brown & Root application.

Even more notably, again apart from Southall, for whom there is separate uncontested application in evidence, that is separately to be treated, there are only 5 of the alleged 48 other applicants, for whom the Employer did not initially produce an application (as, e.g., in the G.C. Exh. 2 series), namely, Jeffrey Cronin, James Skeens, Gary Swisher, Carl A. Walker, and Michael Wise. (The names of only the four in the end contested are underlined in the summary table below to identify that circumstance and notably, *not* including Cronin as Johnson has acceded he had received an application from Cronin.)

The Union has produced a copy of applications for four of the five (all but Wise), and all five have testified in this proceeding in confirmation that they filled out an application for Brown & Root employment, though Employer asserts (only) that it never received the Brown & Root applications of Swisher, Walker, and Wise, nor (I find, in substance and effect) the Job Service's Brown & Root application for Skeens, nor interviewed Skeens, Swisher, Carl Walker, or Wise.

Indeed, in the end, all alleged discriminatee-applicants but two (Harvey Fleck and Gilmer Mosteller) have testified in this proceeding, and confirmed that they filed applications, except Swisher, who had it delivered for him. Employer does not question receipt of an application from Gilmer Mosteller (G.C. Exh. 2ee, a rigger and fit-up (sic) with 38 years' experience), nor from Harvey Fleck (G.C. Exh. 2m, a welder with 20 years' experience) but rather attacks the efficacy of their applications on another basis related to a nonappearance of Mosteller (and Fleck) as a subpoenaed witness under arrangements made with union counsel for all witnesses to appear in an orderly fashion, an argument considered (below). (Presently, I observe and credit the related testimony of Earl Mosteller, who has testified on July 23, 1991, that his father, Gilmer Mosteller, had recently had multiple major surgery, and that various medical complications had developed.) There is no evidence presented to the contrary. It appears of all applicants subpoenaed whose appearance was managed by the cooperation of counsel in the above manner, Fleck alone did not appear because he could not be located at time of call.

Thus, of the above nine alleged discriminatees' applications missing from General Counsel's Exhibit 7 series and,

of the above five unaccounted for in General Counsel's Exhibit 2 series, only an application of Wise is not in evidence, and Wise is in issue, not on submission of such an application to the Job Service for employment by Brown & Root, nor on the fact that he did fill out a Brown & Root application form, nor on the fact he had identified himself on that application form as a volunteer union organizer, nor even that he was questioned about it in interview process, but on the sole and determined circumstance that it was not Johnson who had in that manner personally interviewed him, and that Johnson had not received his application from Job Service.

7. Claims that certain applicants were paid union organizers and Employer's related nonemployee claims

a. *William O. Thomas*

William O. (Bill) Thomas has been a member of Boilermakers Local 677 for many years. Thomas has been an uncontested paid employee of the WVA Building Trades Council since he was first employed as an organizing coordinator by that state council on February 12, 1990 (below). Thomas was 1 of the 48 alleged (boilermakers') discriminatees that are named in the complaint. Thomas remained such until he was removed on a grant of the General Counsel's motion that the name of Bill Thomas be removed from the complaint, as made at hearing on December 10, 1991, and, thus, as Brown & Root would have it noted (essentially) in the 27th day of trial, but of record, also as the Union would have it observed, only following Charging Party Boilermakers International's request, the General Counsel's motion, and as to which, Employer had *then* stated no objection. It was, and is, the Company's contention that in all material times Thomas was a paid agent of Boilermakers Local 667.

It is part of Employer's overall contention that Boilermakers Local 667's ties to Fisher's WVA Building Trades Council were particularly close because as Local 667's (contested) paid agent, Thomas had later become a full-time paid organizer for WVA Building Trades Council under Fisher, though notably that is not shown until February 12, 1990, months after Brown & Root's alleged initial refusal to hire, or to consider for hire, any of the named 48 Boilermakers applicant-organizers (formerly) including Thomas. In passing, I conclude and find that to the extent the Employer has urged in brief that the testimony of Thomas has become irrelevant with the withdrawal of his charge, that contention is wholly without merit. Thomas' testimony remains competent evidence, as to any material issue, and thus is now relevant to the status of others.

There is warrant in the record for the Employer to have been initially misled on Thomas status. Some confusion in this matter probably first had arisen for Employer from the start due to Thomas' actions. First, Thomas had declared in the application that he filed for Brown & Root employment, as his company of previous employment, Boilermakers Local 667, with address and phone. Thomas asserts that is traditionally done, so an employer can get detailed information from the union hall as to where he has previously worked. But that is not the norm shown here.

Thomas' legal paid organizer status, as discernible on February 12, 1990, is as a full-time paid employee of WVA Building Trades Council, with assigned duties as organizing coordinator of the state council, and with responsibility to assist all councils affiliated with it, including the Charleston Building Trades Council, in desired services, including those of organizational nature. Thomas claims he was confused about his duties on his first day as organizing coordinator of the WVA Building Trades Council on February 12, 1990, servicing Charleston Building Trades.

On February 27, 1990, Thompson wrote Brown & Root employees, after first noting that many Brown & Root employees had recently inquired about union representation, ''that the Charleston Building Trades Council's . . . craft unions had voted unanimously to 'welcome' them into their fold.'' Thomas also assisted Thompson in a Charleston Building Trades Council organizational campaign begun in late February, early March 1990.

Thomas communicated to Employer a day earlier, by wire of February 26, 1990, with Charleston Building Trades Council as apparent sender, and he signing as organizing committee, with council address, not that an affiliate of Charleston Building Trades Council was begining an organizational campaign but that a Boilermakers International's organizational campaign was then beginning. Thus:

> Many of your employees have chosen to support the International Brotherhood of Boilermakers, Iron shipbuilders, Blacksmith [sic], Forgers, and helpers AFL–CIO. They will be actively organizing your job site in Institute W.V. as you know there [sic] rights are protected under section 7 of a national labor relations [sic] Act.

The confusion no doubt continued for Employer because Thomas was new in his job as an orgnization coordinator employed by the State Building Trades Council with responsibility to assist the Charleston Building Trades Council. But Thomas was a member of Boilermakers Local 667, and he was organizationally involved long before that, in September 1989, in activities in furtherance of Boilermakers Local 667's implementation of a Boilermakers International's fight back campaign at Brown & Root's jobsite, which then included Local 667 member-applicants appearing (both individually and in groups) at the state Job Service, filing individual applications for employment with Brown & Root, that notified Employer that the applicant (essentially) was a Boilermakers Local 667 volunteer union organizer. The fact, however, that Thomas may have had some measure of internal union involvement in keeping track of those that did file an application for the Union did not constitute him a paid agent of Local 667.

Contrary to the urging of Employer, the Boilermakers Local 667's fight back campaign implementation in September 1989 involved, for the most part (as shown below), unemployed Local 667 Boilermakers who filed timely applications for an employment with nonunion contractor Brown & Root, at McCormick's request, with the involved member-applicants individually identifying themselves (variously, but essentially) as Boilermakers Local 667 volunteer union organizers.

Thomas was also earlier personally involved in certain other matters then sponsored by Charleston Building Trades Council, but which were also supported by his own local union, most notably certain SAFE activities, and which Thomas later in 1990 served more formally, on behalf of

Charleston Building Trades Council and/or Thompson (below). Thomas, however, was never paid by SAFE. The Employer's claim that Thomas, and certain others were paid union organizers, and hence not employees, has proven to be unfounded on all but Thomas, and he shown employed only as of February 12, 1990, by WVA Building Trades Council, but never as a full-time paid union organizer for Local 667.

It was, I find, on February 12, 1990, Thomas became a *full-time* paid organizing coordinator of the WVA Building Trades Council, for which he was paid (in 1990) over $33,000 in wages and other compensation. Indeed, it was Thomas who thereafter filed the instant original charge in Case 9–CA–27674 on behalf of Charging Party 2, the WVA Building Trades Council (whether) on April 18 (or 16), 1990. Fisher has corroborated that Thomas (I find) a year later in April 1991, worked full time for the State Trades CTTAP program in Fisher's Charleston office. (I find it established on weight of credible evidence that since April 15, 199*1*, to date, Thomas has been employed full time as a director of training in the CTTAP program of the W. Va. Building Trades Council.)

The material factual issues then relate to Employer claims that Thomas occupied status as paid agent of Local 667, prior to, and after February 12, 1990. First, to extent Fisher has related (seemingly at best on one occasion) that the WVA Building Trades Council had employed Thomas as an organizer in September 19*89*, I do not credit that testimony, clearly shown as mistaken, if not more likely simply misstated at the time, on weight of far more credible and convincing evidence that appears to the contrary. There is no convincing proof offered that Thomas was paid anything by the State Trades Council before his full-time assignment with them on February 12, 1989.

In early material times (September 1989) the WVA Building Trades Council and the Charleston Building Trades Council had offices in the same building, on the same floor, directly across from each other. The address of their building (then) was 1716 Pennsylvania Avenue, Charleston, West Virginia. In contrast, Boilermakers Local 667's hall, where Thomas' membership resided, and out of which Thomas was regularly referred, is at 109 Park Drive, on the west side (just outside) of Charleston.

In the background of the contention that since certain alleged discriminatee-applicants were declared agents of Boilermakers Local 667, whose illegal (picketing) objective was to remove Brown & Root, the Employer was justified in not hiring any of the Local 667 paid agents, Employer anticipated counsel for the General Counsel and the Boilermakers, nevertheless, may attempt to draw a distinction between paid and unpaid union agents. Employer's view was that (in addition to Thomas) at least five organizer-applicants had received compensation from Local 667, yet simultaneously held themselves out as bona fide applicants (in 1989). Thus, Employer contends they (similarly) fall squarely within paid union organizer exception in the Fourth Circuit's decision in *H. B. Zachary Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), and Brown & Root was justified in not hiring these paid union agents. The contention is without merit.

Employer basically claims Thomas was as of then (September 1989) and has remained a member of and a paid agent of Boilermakers Local 667. Employer urges that is shown by virtue of Thomas' receipt of $4,297.92 in (apparent union fiscal year) 1990 in wages and nonemployee compensation (essentially) in payment—reimbursement for certain duties performed for Local 667 in that period, i.e., for certain election duties performed for Local 667 in 1990 (as in 1987), with reimbursement and/or compensation paid at existing Boilermakers' rate for that, and for certain instructor training of apprentices he performed once a month and, in payment for certain full time, but for limited period, trade work he individually performed individually in the construction of Local 667's new hall.

The argument being made is that as a paid agent of both organizations Thomas became a living link between Boilermakers Local 667 and WVA Building Trades. Employer's argument that Thomas *was* a paid agent of both in 1990 (with view to its insecure evidentiary base for Thomas as a paid agent of Local 667 in 1989) is shown wholly unfounded. There is no convincing showing made of any union organizer status paid for by Local 667, let alone any *joint* paid union organizer status paid for by Local 667. Ironically, as is found below, Thomas was active in 1989 in Local 667's implementation of the Boilermakers International's fight back organizational campaign with Brown & Root, in making personal application, and in assisting others in making application for employment by Brown & Root, but is simply not shown on this record as doing so, as a paid agent of Local 667.

The record reveals that Thomas was not factually then a paid organizer for Boilermakers Local 667. Rather, prior to February 12, 1990, I find Thomas had been a long time and active member of Local 667. Clearly, Thomas served on several of Local 667's committees, for which part-time services he (as others) received some money, either in payment for part-time work hours expended or in reimbursement for the wages he (they) lost in performing union-desired services and/or for expenses associated with some temporary assignment from the Union, even if on regular, but clearly part-time (apprentice instruction) service basis. Thomas (and others) on other occasions received nothing for certain construction work performed for the Union on the new building(s).

More specifically, Thomas served as chairman of Boilermakers Local 667's building and training committee and, relatedly as an apprentice instructor, performing that latter service one Saturday a month. For that committee work, and for the 10 hours that he worked one Saturday a month as an apprentice instructor, Thomas was paid at existing Boilermakers' rate of $17.01 per hour, but for which (at least) latter apprentice instruction work, Boilermakers Local 667 apparently is itself reimbursed, by appropriate apprentice organization.

In December 1989, Thomas briefly worked full time for Local 667 (but in his trade, as did others) in the Union's related construction of a new hall, and limitedly so. Thomas had also served on Boilermakers Local 667's election committee in 1990 (and 1987), for which services he was similarly paid. All of these were part-time union services, excepting only the above full-time but limited temporary construction work on the new building for which he was paid contract rate.

To the extent that Employer has argued the above full-time December work services of Thomas for which he received the above pay/reimbursements from Local 667 are sufficient to constitute Thomas a paid agent of Boilermakers Local 667

such that his application for employment as filed with Brown & Root 2–3 months' earlier, on September 19, 1989, with declaration by Thomas of being a ''Boilermaker Local 667 Volunteer Organizer'' has effectively constituted him a paid Boilermakers Local 667 union organizer, in light of failure to show any payments for union organizational duties, the argument is wholly unpersuasive. At best the argument for full-time paid organizer would not apply before February 12, 1990, when Thomas became employed full time as an organizing coordinator for WVA Building Trades Council, but then as a paid organizing agent of that state council, not Local 667.

Moreover, the same conclusion readily applies to any other applicant for whom Employer has advanced similar evidence and would seek to similarly argue for disqualification of them from a protective coverage under the Act, under an urged application of determined nonemployee status as found by the Fourth Circuit in its review of the status of a *full-time* paid union organizer in, *H. B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), denying enf. to 289 NLRB 838 (1988).

b. *Paul Frye, Michael Haught, James Hudson, Earl Mosteller, and Raymond Smith*

Employer claims the other five are: (1) Paul Frye, a Local 667 union steward; (2) Michael Haught, a Local 667 union steward in 1990; (3) James Hudson, a paid executive board member of Kanawha Valley Labor Council for Local 667; (4) Earl Mosteller, paid Local 667 election committee worker in 1986 or 1987, and paid delegate to the (state) AFL–CIO convention October 18–20, 1989; and (5) Raymond Smith, Local 667 inspector from July 1989 until June 1990.

Paul Frye. Frye has testified that he has been a union steward for Local 667 on a job before, and that for the period of time a member is a steward, the member does not have to pay certain union assessments.

Michael Haught. Haught also testified that he had served as a union steward. Haught more definitively testified that when the job gets to be a certain size, the steward gets paid for taking care of the union steward report. He has been a steward on several different times throughout the years, including this year, and prior year (1990), but he could not recall the dates, saying the union hall would have them. Haught then identified the $18.76 check (R. Exh. 96), dated April 9, 1990 (and the only one supplied for the material period), as received from the Union for reimbursement of field dues (2-1/2 percent of gross) that he was exempted from paying while a steward, but which had been previously withheld from him by the Company.

James Hudson Sr. Hudson (and two other members) have worked on an apprenticeship building being constructed on the Union's property. Hudson received 3 weeks' pay at his standard rate for putting up steel in the new apprenticeship building. Though he initially believed it was in November, he acknowledged and I find he did so in December 1989. (For that work, Hudson received $770 (gross) for January 4–8 (40 hrs.); similarly $770 for January 11–15; and $770 for the following week.) I credit Hudson's testimony that he had worked on that building also for 6 weeks for no pay at all, off and on, when he was not working. And see related *Ira Jeffers*' account (below). Hudson has confirmed that he is a representative from Local 667 serving on the executive board of the Kanawha Valley Labor Council, but he testified he does so at no compensation and with no expense reimbursement. Hudson testified it had not entered his mind about resigning if he were hired by Brown & Root. It had not interferred with his working before.

Earl Mosteller was a Local 667 delegate to an AFL–CIO convention of all the locals in the State. The convention was held on October 18–20, 1989, for which he was reimbursed $503.92, for 24 hours (attendance), mileage, and meals. *Tim Oldfield* received payment from Local 667 *from time to time* for performing instructor services in a mobile welding trailer that traveled around the State. A check to him for $73.60 on February 4, 1991, however, was a reimbursement for his foreman (school) training expenses from January 28 to February 1, 1991, in a union-employer cooperative program, designed to upgrade the employees' skills.

Raymond E. Smith has received no compensation from the Union in material times. For performing, however, (internal) inspector (doorman) service to the local union from 1987 to June 1990, Smith has received mileage and his dues reimbursement. He has received $600–$700 in expenses in the last year or two. (Smith drives 150 miles to scheduled meeting(s), or 300 miles round trip, at 22 cents a mile.) The parties stipulated, on the basis of the Labor Department (LM2), that Boilermakers Local 667 reimbursed Smith $641 from July 1, 1989, to June 30, 1990.

Smith's related recollection of receiving expenses in this period for attendance at a legislative education action committe (LEAP) meeting for the Union, for which he related he probably had received reimbursement for lost wages, apparently may be erroneous, though there was LEAP action apparently in early 1990. (The LM2 lists Smith only as an inspector for which it shows the above expenses.) If not, and there is error, the service in such calls for no different conclusion to be reached in this matter.

c. *Others (seven) shown similarly situated of record, albeit mostly later*

Barker Herbert. Barker, who worked and was paid for 3 weeks' work in December 1989, performed on the Union's new training building (R. Exhs. 52A–C) seemingly cooroborated that he and other boilermakers had volunteered all their time before this. Barker was also reimbursed for lost wages for the time that he spent in sitting in on a trial body hearing, and deciding internal union charges brought against a fellow member, held during the day, in August and September 1990 (R. Exhs. 53, 54A–B). Barker had also become an inspector for Local 667, a local office, and as such on October 23, 1990, he had and since received monthly reimbursement for his field dues and any building and trade dues that are withheld for that month (R. Exhs. 54C–D). He received executive board mileage, with the same, for the months March–June 1991 (R. Exhs. 55D–F). Barker is reimbursed (for mileage only) for attending meetings (when he is unemployed) (R. Exh. 55A). Barker received reimbursement for meals, etc., while attending foreman training school January 1–29, 1991 (R. Exh. 55B). The local's bylaws provide for all these reimbursements, but so far as he knew not for reimbursing volunteer organizers. He did not expect to get reimbursed for that.

Kelley Kenneth. For work performed in the apparent similar union Building Fund work period in July–August 1990,

Kelley received three checks in the $736 to $770 range and $364.18 for a 1-week period, January 21–25, 1991. Kelley testified that the 1990 payments were for his finishing up metal work (i.e., rerun of welding machines; setting test booths up; and making required racks) on the inside of their new building where facilities for arc test (below) were needed to be run in about 3 weeks, to accommodate testing of 200 boilermakers. (The payment made in early 1991, however, was apparently for part of the same work that he performed in 1990 that went over budget, and for which he was not paid until then.)

Moreover, I find that Kelley in the above work period was unemployed, and though he came off a short-term unemployed list for this work, I find he stayed on the Union's long-term unemployed list. I credit Kelley that in all material times he was immediately available for long-term employment by Brown & Root, as there was a significant number of boilermakers on an out-of-work list, and who could have performed the Local's work. On January 13, 1991, Kelly received a $202.50 payment from the Union for a common arc welding test. This is a program supported by companies and their customers (e.g., power companies), under which the welder performs test welds every 6 months. The results are recorded on paper, and the welder does not have to take welding tests when employed in the interim, thereby lessening the cost of welding tests borne by the companies.

George Pinkerman has been the elected president of Boilermakers Local 667 since July 1990, but has continued to work in the field. Pinkerman received certain payments of money from Local 667 (R. Exhs. 47(a)–(i)) in connection with his presidential duties. Pinkerman receives $100 in a monthly president's allowance check, and a check for reimbursement of wages lost during the time when he was on a negotiating committee for an Ohio Valley agreement over the course of 1-1/2 to 2 months. He also receives certain field duty and Building and Trades (dues) reimbursements. He also received mileage expenses for travel to the Local's executive board meetings, and he has received a $600 expense advancement for a union leadership conference (R. Exhs. 49(a)–(d); and R. Exhs. 50(a)–(f)).

For other examples see *William Combs* (who was paid for classroom training of apprentices 1 day in a month, thus $202.50 on February 2, 1991; and $202.50 on March 4, 1991. *Rodney Hale* received a check in the amount of $75 on February 4, 1991, in reimbursement of his expenses for attending a foreman's training school. *Paul E. Webb* received a check (dated Feb. 1, 1989) for attending a foreman's class that covered first aid, safety, and job knowledge (R. Exh. 85). Webb testified that he was also reimbursed for lost wages when, while working a job, he took part in a national apprenticeship competition for the Union. As best he could recall, it was $200 to $300. Webb denied that he ever had a full-time job with the Union.

See also *Ira R. Jeffers* (R. Exhs. 26–35), where (essentially) $202.50 gross payments were made for similar 10-hour apprentice classroom training (or meetings) held (while Jeffers was otherwise unemployed) on November 6 and December 17, 1990, and January 11, February 2, April 6, and May 6, 1991; $405 for (a 20-hour) service as a welding instructor paid on January 15, 1991; and $122.61 expense reimbursement for a personal attendance at a foreman training school. I do note and credit Jeffers' related testimony that the apprentice training payments he received were reported to unemployment, and they effected a $90 family income loss for the period in which he worked 10 hours. Jeffers (not unreasonably) consequently viewed his training service that he had provided not as a profit deal, but just something he does to pass on his knowledge and experience to others.

Neither all the above different type payments for limited part-time union service, nor even temporary full-time employment in construction (shown here as occurring usually when an individual member is otherwise unemployed) constitute the recipients (even when considered in combination with their application declarations as volunteer union organizers) as full-time paid union agents for any organizational purpose. E.g., there is absolutely no evidence presented that any of these payments were made by the Union in subterfuge for organizational duties performed, let alone constituted payment made for full-time service at such. It seems to me that there is question that the Fourth Circuit would view the *1989* circumstances of Thomas and the other applicants as not presenting the issue that it previously reviewed, which was that of a full-time paid union organizer.

The court said of its ruling on a *full-time* organizer employed by a union, and sent by the union to organize the company, and whose salary on hire was to be reduced by the amount paid to him by the company to which he was applying, *H. B. Zachry Co*., 886 F.2d at 75 (4th Cir.):

> We emphasize, however, the circumscribed nature of our holding. We uphold the employer's right to reject a job applicant simultaneously paid and supervised by another employer. We do not encroach, however, upon the fundamental purpose of the NLRA to protect those with union sympathies and allegiances from unfair practices. The Act is designed to protect those loyal to labor unions from discrimination in future applications for employment. We do not, for example, have before us applicants for employment who have, in the past, organized workers for collective bargaining rights, or applicants who have received payment or reimbursement from a union in the form of strike benefits. We do not deal here with those who moonlight. Nor do we have here a company that has a policy of accepting applicants already fully employed, yet then rejects an applicant because he is fully employed by a union.

Employer had a policy of hiring qualified applicants for employment, and I find below that the 48 named applicants were shown prima facie qualified and seeking employment. Consequently, there is a real question whether the Fourth Circuit would rule any of the 48 named applicants who have shown qualifications for the job and availability disqualified in 1989 (including Thomas, apart from his full-time organizer status as of February 12, 1990) because they performed the above limited services for the Union for which they were paid.

A court review in this matter potentially lies in the Fourth Circuit. With the grant of the General Counsel's request to withdraw complaint allegation in regard to (only) Thomas, however, at the Charging Party Boilermakers International's request to withdraw the underlying charge in that regard, with the General Counsel's and Thomas' approval, and with

no objection raised by Employer timely, there is resultingly no issue on Thomas presented.

Be that as it may, I do not overlook the court's observation earlier in its decision, id., ''If the practice here is accorded judicial approval, a union might command significant numbers of its employees to work for corporations in which elections are anticipated in order to skew the results.'' But the court did not have that case before it, and thus the observation appears as dicta. The Board has considered the matter of paid organizers in the election circumstance and observed that such determined employee status under the Act does not ensure their right to vote, and paid union organizers who may seek only temporary employment may be properly found to be without community of interest with unit employees and ineligible, *Sunland Construction Co*., 309 NLRB 1224, 1229 fns. 32 and 33 (1992). With due deference to the Fourth Circuit the Board has reaffirmed its view that the Act extends employee protection to paid union organizers, and an employer may not refuse to consider for hire or refuse to hire a full-time union paid organizer, except in time of strike. But unpaid union organizers, even in strike circumstances where the union's goal is to enforce its economic goals by severely restricting an employer's production, are another matter.

Moreover unlike the ''command'' element on union employees as observed by the court there, here, I am wholly convinced that if not all, almost all of the named applicants are shown affirmatively to have *voluntarily decided* to apply to secure employment with Brown & Root, and seek to organize their employees at the Rhone-Poulenc jobsite, albeit that election generally folowed union inquiry and request (below). Unlike the 2- to 3-month job that the administrative law judge was presented with and analyzed in *Sunland Construction*, supra, Brown & Root's jobsite at Rhone-Poulenc projected out at 2–3 years. Thus, the General Counsel and the Charging Party only the more persuasively argue that to deny the Act's protection here to these prounion applicants is to deny the Act's protection to those applicants only because they do bear an allegiance to the Union, and who have elected to pursue their Section 7 rights of organization and to withold their right to have their applications for employment considered without discrimination on that account. In my view, even temporary full-time employment in construction of the Union's building(s) does not change the statute's protective reach in that regard. Less than full-time employment as a paid union organizer is not addressed in the *Zachry* case, supra.

Moreover, even if the presently alleged discriminatee-applicants above were to be deemed in some manner I overlook as paid union organizers, the Board has recently itself reviewed in depth existing Supreme Court, circuit courts, and its own precedent on the underlying issue and, noting the split in the circuits, with all due defference to the Fourth Circuit's differing view, has reaffirmed the view that a full-time paid union organizer enjoys protected employee status under the existing Supreme Court and Board precedent, *Sunland Construction Co*., supra. Indeed the Board has extended protection to member-applicants, where the union had established a fund to ''reimburse members for wage, travel, and health benefit differentials they incurred on nonunion jobs,'' *Town & Country Electric*, 309 NLRB 1250 (1992).

As there is no discriminatory refusal to consider for hire or to hire allegation remaining in the complaint as to Thomas, there is no presentment of that issue for consideration in instant picket line conditions, such as was addressed in the exception of an employer's permissible nonhire of a paid union organizer during a strike in *Sunland Construction*, supra. Apart from Thomas, the union payments to other employees on the basis of which Employer would seek to deny employee status, or cause forfeiture of Section 7 employee right here addressed, are not even shown tied to organizational duties, nor is any question of subterfuge in union payments for organizational activities therein reasonably evidenced. In that regard, see and compare *Sunland Construction Co*., supra at 1231 fn. 41, 2d par., where the Board observed:

> Employees who are not on a striking union's payroll are another matter. They may well still support the union as a bargaining representative even though they have abandoned the strike and returned to work. See *NLRB v. Curtis Matheson Scientific, Inc*., 494 NLRB U.S. 775, 781 (1990). But because they are not obligated to the union as paid agents, it cannot necessarily be presumed that they will be seeking to further the Union's object of depriving the employer of employee services during the strike. Thus in finding that the Respondent could decline to hire [a paid full-time union organizer] during the strike, we do not suggest that employers have carte blanche to refuse to permit pro-union employees to return to work during a strike or to hire them as strike replacements.

Employer has extensively reviewed the above authorities (including their progeny, and other urged related precedent) on this issue, only in the end to arrive at a differently urged result than that found by the Board in *Sunland Construction Co*., supra, etc. Those observations and arguments, in light of the circumstances of the Board's clear holdings on the matter, appear more appropriately to be presented in the first instance to the Board itself, especially with the recent full reviews the Board has made of the underlying issues. It is clearly the duty of an administrative law judge to apply established precedent that the Supreme Court or the Board has not itself reversed, *Fred Jones Mfg. Co*., 239 NLRB 54 fn. 4 (1978); *Ford Co*., 230 NLRB 716, 718 fn. 12 (1977); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963); and *Novak Logging Co*., 119 NLRB 1573, 1575–1576 (1958).

Employer's remaining contentions on the Union's responsibility for conduct of an authorized picketline presents diverse separate agency questions that are based on different concepts, and they are best addressed separately (below).

A material Local 667 *unpaid* agency of Thomas, however, in Boilermakers Local 667's implementation of Boilermakers fight back campaign in September 1989 *is* one that is here reasonably established otherwise, in that Thomas claims, and the record has convincingly shown, that Local 667's business manager, McCormick, had independently directly instructed Bush and directly and/or indirectly instructed Thomas in September 1989 not only in regard to content of Thomas' own application for employment at Brown & Root, if he applied, but McCormick had instructed Thomas as to desired content of any other Boilermakers members' applications that might be similarly submitted to Brown & Root for employment. (Whether that authorization to act for the Union is suf-

ficient to transfer to other matters, e.g., to bind Local 667 or its member-applicants, as by any Thomas' illegal conduct on the picket line, and/or SAFE action (below), would appear to raise a still different question.)

8. The Boilermakers' applications

All applicants for whom there are applications as shown by General Counsel's Exhibits 2 and 7 are collectively listed below. Included is Wise on his credited testimony that he filled out a Brown & Root application. Most of the employees as shown above and below are self-confirmed applicants who have, by great weight of mutually consistent and corroborative testimony, including Johnson's general accessions he had interviewed most of the applicants that had put the words ''voluntary union organizer'' or words to that effect on their applications (and see related discussion below), established they had individually filed a Brown & Root job application at the state Job Service, that was processed.

The applicants *were* all initially interviewed usually by Rayhill, but on occasion by some other Job Service employment agent, and (I find) then by Brown & Root's personnel manager, Johnson, except apparently for Wise (and possibly one or two others) who had filled out Brown & Root application(s), and Skeens, who had filled out only a Job Service application, and (I find), more probably than not, had not been interviewed by him. Any and all otherwise so questioned have confirmed as the date of their application submission either the date that appears as being their date of application (on the front page), or the date they signed the application (on the back page), or the likely date of same has been otherwise convincingly shown testimonially, as by recollection of others being present whose date of application is firmly established.

E.g., Wise, who could not recall the date that he had applied, and whose application is not in evidence, nonetheless has recalled that he filled out his application the same day that Don Mosteller, Rodney Lamp, Ron Elliot, and James Hudson did. In each instance, application for the above is shown convincingly of record to be on September 21, 1989, and is confirmed by Employer's acceded applications (G.C. Exh. 2 series), as well as by the confirming, substantially interlocking the Union provided evidence (G.C. Exh. 7 series), if not also warranted to be concluded further supported by General Counsel's Exhibit 6(b) list, e.g., if the lists are not to be viewed as competent evidence as a supportive business record. (In my view any contended self-serving element goes to the weight to be attached to the lists. Here, the lists (G.C. Exhs. 6a and b) are consistent with and but further corroborative of testimony of member-applicants, and other competent evidence of record, and deemed reliable, and supportive evidence themselves).

a. *Employer's contention that the applicants were not bona fide*

(1) Employer's claims of deficiencies in 21 applications and that 1 application did not declare ''volunteer union organizer'' status

Employer has advanced several claimed application deficiencies on 21 named applicants. Employer asserts in reply brief that opponent parties have failed to show that as many as 21 of the organizer applicants met the qualification criteria under the standards related in *Fluor Daniel*, 304 NLRB 970 (1991), and that in actuality many of the organizer-applicants did not testify to any personal interest in employment with Brown & Root, but rather variously testified to having wholly different motives for applying, and that one other applicant (Morrison) did not actually identify himself as a Boilermakers volunteer union organizer. Claimed deficiencies of (1) Skeens; (2) Swisher; and (3) Walker have been addressed above. Claimed deficiencies of the remaining 18 are next considered:

Deborah M. Blue and *Tamara Moore*. (4) *Deborah M. Blue*: Employer asserts that Blue was working at another job when she decided to apply for work at Brown & Root, and it claims Blue had no personal interest in a job with Brown & Root. Employer's claim is not supported, certainly not exclusively. When Blue was asked whether the sole purpose she applied was to organize, Blue had more indicated her reasons were threefold, with work in the advanced position, in replying, ''Other than work and safety awareness and organizing.'' Moreover, the safety reason she secondly asserted was the subject of later further inquiry, at which time Blue testified firmly that she would show them through her education and training that her work was safer than untrained people, which she had read in the papers they were hiring.

Blue did recall she was working when she *decided* to apply for employment by Brown & Root. Blue has testified, however, that she did not remember if she was working when she applied. On her application Blue had explicitly stated she was available on September 22, 1989, the same day that it is established that she had applied. Moreover, Blue explained (plausibly) that construction jobs are frequently of short duration, and she is always looking (for her next job) before she loses the one that she has.

Blue has otherwise confirmed that she applied at Brown & Root to organize, but notably she testified that no one had asked that she apply at Brown & Root for the purpose of organizing. Blue rather testified that she heard several boilermakers talking about applying for employment at Brown & Root, recalling ''B.B.'' (sic, seemingly Raymond ''BeeBee'') Smith (who applied on September 21, 1989), as one who was talking on the job where she was working (Kammer Plant) about applying for a job there. Both Blue and Smith worked for Northern Boiler at this time. Blue called McCormick about it. Blue understood boilermakers worked the Union only, but she had previously attended the fight back seminar at Charleston Civic Center, where seeking employment at nonunion contractors to organize them had been discussed.

According to Blue, she had asked McCormick what was going on, and if it would be okay if she could (apply). McCormick said it was okay to work nonunion if there was a good reason, and McCormick said to help organize was a good reason. Blue confirms that McCormick then suggested Blue put Boilermakers Local 667 volunteer organizer on her application, which she did. Blue also put union officials down as her references because they knew her work, not because she was told to do so. Blue knew that Brown & Root was paying substantially less than the union contract rate, but Blue still wanted to go to work for Brown & Root. Blue had worked for different union contract rates, some higher (e.g., 100 percent, for new work), but also some lower (90 percent for repair or maintenance work) in order to be competitive with nonunion contractors.

Blue recalled that at the fight back seminar that she had attended they were given a folder with paper in it to take notes on, a copy of a newspaper article, and some bumper stickers. They then explained to us what the program meant, namely, that through education and public awareness things could be changed. Blue thought they had mentioned applying to a nonunion contractor, because that was the only way to get hired by them. Blue confirmed that the subject of picket line violence was also discussed, and Blue corroborated others that they were told, it is an outdated method; it does not work anymore; they should not use it; and it is just not the way to go anymore.

Blue also thought that (at the seminar) they were told to put volunteer organizer on their application. Blue testified that as a volunteer organizer you would try to educate the community and the people you worked with, and if you were hired by a nonunion (company) that would simply give you a chance to be in contact with those people. If she were hired, she would try to educate the people she would work with on the reasons or advantages for being union, as compared with those for not and try to encourage them to become union.

Blue's understanding was that she was interviewed by a Brown & Root male employee, but did not recall the man's name. Blue testified later that after filling out the Brown & Root application, she (and her sister Tammy Moore) were not really then interviewed, recounting:

> Well, after we filled them out and we waited to be interviewed, he just said, ''That's all.'' We said, ''Well, what about the interview?'' He said, ''It looks like you've got everything wrote down here.'' He said, ''That's all we need.'' We asked him if they were still hiring and he said, '''[Y]es.' We asked him if he knew how many and when. And he said, '[S]hould be soon; and, they've got everything they need here on your application.'' Some of Blue's testimony appears to suggest last interviewer was not Johnson.

Blue had testified that when they first went in to the Job Service, we asked him if we had the right office, and he (at least on one occasion, also identified as a person from Brown & Root) then had said, ''Depends on what you're looking for.'' We asked him if he was the person taking applications for Brown & Root and he said, ''[Y]es, he was.'' And he asked us why we wanted to put an application in, what would we do even if they did hire us? We told him, work. He said, ''What kind of work?'' We said, ''[W]ell, anything they had to do.'' He said, ''Such as?'' We said, ''[R]igging, welding—just anything.'' He said, ''[Y]ou two?'' He then asked us what made us think we could do it, and we told him we had been doing it for several years. Blue also told him she was a boilermaker welder.

In regard to the last review by Johnson, however, Tamara Moore (next), Blue's sister, both convincingly identified Johnson at the hearing as the person to whom they had given their filled out applications, and Moore corroborated Blue that Johnson really did not interview them, just took the applications and said, ''This looks fine, thank you.'' In contrast with Blue, Moore recalled she had called Bush to find out if it was alright to use union officials as references, and she received approval. Both used them.

Blue had 13 years' experience. She had completed her 4-year apprentice training in a little more than half the time allowed, and she was trained in welding, rigging, fit-up, bolting, and blueprint reading. Blue obtained a copy of her application to Brown & Root, for her own personal use, which she asserts she still has. Though Blue's further recollection was that she did not go back to Local 667, she could not recall if she had given a copy to the Union. It is far more likely she did (G.C. Exh. 7C).

As a boilermaker welder she welded on tubes (of varing size diameter) that were usually under high pressure, and pipes that were not always. Blue related that heliarc welding is actually an improper, but a commonly used name for TIG (tungsten and inert gas) welding, which was becoming more commonly used in pipe welding. Blue performed that and also stick welding, testifying both TIG and stick welding are used in both tube welding and pipe welding.

Essentially a tube is in a boiler, and pipes are outside the boiler. A boiler may have a wall of water composed of 40–50 1-inch pipes in the boiler, and the water wall may go 10 stories high. As a boilermaker she removes any worn tubes and replaces them and, if not too worn, pad welds them. When engaged in tube welding, the boilermaker needs a partner (working with a water wall between) to pass a weld for a contiguous weld, but not when pipe welding (where you are in the open, and you can get all the way around yourself). Tube welding was more difficult than pipe welding. Blue did both, and was a qualified welder.

(5) *Tamara Moore*. Employer also contended that Moore's only reason for applying was because Jim McCormick instructed her to. Moore had initially recalled it was McCormick, but then corrected that it was her sister (Blue) who had informed Moore that it (Brown & Root) was taking applications and *if Moore was interested*, McCormick wanted them to go down and fill out an application for employment with Brown & Root and put union organizer on it. Moore was interested, did file an application for employment with Brown & Root, and put on her application, ''I am also a Boilermaker 667 Volunteer Organizer.''

Moore more explicitly clarified that she heard of it from her sister and not McCormick, that her sister said that she found out they were hiring down there, and she had said that we should go down and put an application in. Moore did testify she knew that Brown & Root was nonunion. She wanted to work for them, to organize the other employees of Brown & Root.

Moore testified that though working 13 years in the trade, because she worked a different location, with required hours accumulations, she had not become a journeyperson boilermaker until July 1989. At the time that she applied for employment with Brown & Root, however, she was then a journeyperson, encompassing both (desired) pipe welder and pipefitter skills. Moore was a fully qualified welder, and she testified she could do most anything Brown & Root would have asked her to do. Moore met Employer's job qualifications.

Richard Cashdollar and *George Pinkerman*. (6) *Richard Cashdollar*: Employer contends Cashdollar still had a job when he applied; and, that he applied because he ''[w]anted to organize a Union . . . . As soon as possible.'' Cashdollar did not testify he was still employed when he made application. Employer appears to have relied on certain testimony

of George Pinkerman (a coworker) in that regard. In any event, the record shows Pinkerman applied at Brown & Root on September 20, 1989, with Cashdollar, while Pinkerman was still employed, *but also that Pinkerman knew he was going to be laid off the next day* (Tr. 1634). Cashdollar had explicitly stated on his application that he was available anytime. There is simply no warrant to conclude to the contrary on this record. Notably even Pinkerman had stated explicitly on his own application that he was available now.

Moreover Cashdollar confirms that he became interested because *some others were going to put in applications for employment, so he decided he would too*. Cashdollar did say he filed an application because he wanted to organize a union, as soon as possible. Cashdollar also said that he did so, because he is a union man, that is what feeds him, they work safe and, in his view, there was a concensus then building every union man, not just Boilermakers member, wanted to organize Brown & Root.

Cashdollar, however, got it (filing an application) okayed before he did it. Cashdollar asked McCormick if it would be all right if he applied for employment at Brown & Root. McCormick okayed it and stated Cashdollar should put Local 667 union organizer or something to that effect on his application, which he did. He viewed it as a matter of being accurate on the application and not lying. Cashdollar had years earlier worked for a nonunion contractor after getting McCormick's permission on that occasion.

(7) *Pinkerman, George*. Employer contends that Pinkerman gave only one reason for being willing to accept work at Brown & Root: ''To try to organize them.'' Pinkerman testified he had submitted his application for employment at Brown & Root *because he wanted to get the job*, and he wanted to get in the plant to organize them. At the time Pinkerman was employed at Willow Island Power Plant, but *he was going to get laid off the next day*. From talk on the job some others were going to apply, so Pinkerman decided that he would too.

Pinkerman, a boilermaker, filled out an application on September 20, 1989. Johnson interviewed Pinkerman and went over his application. Pinkerman had put down as first preference pipefitter, because it is what (he understood) that they were hiring. (Pinkerman relatedly explained, the biggest part of Boilermakers have skills to perform union pipefitter work. Some might not have a specific welding skill. Some pipefitters can weld; others cannot.) Pinkerman recalled that Johnson inquired if he was a welder, and asked about his welding qualifications, i.e., whether he could do heliarc (TIG) welding and stick welding. Pinkerman told Johnson he could, and that he was available. Johnson then asked about Pinkerman's blueprint reading skills. According to Pinkerman, when Johnson got to the part on the back that stated ''Boilermaker Local 667 Volunteer Union Organizer,'' Johnson read that aloud, and then laid the application to the side and he said, ''That will be all.'' Pinkerman left.

At first, Pinkerman asserted he could not recall if someone had told him to put volunteer union organizer on his application, nor could he recall if a local union official had told him to do it. Then he related that the other Boilermakers there (Cashdollar, Combs, and he) discussed it, and they decided to put it on the application because (compatibly with what others were told) we wanted to get in there and to organize Brown & Root. As a volunteer union organizer, Pinkerman understood he would go in and try to organize them; he would pass out authorization cards for membership in the Local; and as he relates, if you get the men to sign over 50 percent (sic) you petition the NLRB and they hold an election.

Pinkerman had attended the fight back (February 1989) seminar held at the Civic Center in Charleston. He received a package at the time. He confirmed the fight back package included: small newspapers, The Boilermaker Organizer; a bumper sticker, ''Boilermakers Fight Back''; an ink pen; and some pamphlets. Pinkerman then recalled Newton Jones, Boilermakers' International director of communications was there as was organizer Tony Yakemowicz and Connie Mobley (a field director of organizing). They each spoke, and then went over the fight back program, mostly on how to organize people as boilermakers.

The boilermakers in attendance were told to try to get on the jobs; and ''when you organize, you do it before work, dinner time, after work hours; try to get people to sign the authorization cards where you can have an election to have the Boilermakers be their collective-bargaining agent.'' There would be no expenses paid; it would be strictly voluntary. Nonetheless, Pinkerman related if Brown & Root had called him for work he would have gone, at less than the contract rate, to try to organize them to get the contract in there.

(8) *Stanley Combs*. Employer contends Combs' only reason for applying was to try to organize Brown & Root. Coombs testified that he would read about it in the paper too, and he made an initial suggestion to McCormick the day before he applied, ''Well, we ought to just go up and fill out the application,'' and go in and organize. McCormick told Combs to go up there and do it. Combs also testified that apparently (and accurately) they were already doing it, but he did not know that when he spoke to McCormick about it.

Combs figured that Brown & Root was paying less than the union contract rate, but confirmed he would have gone to work for them to organize them and get them with the Union. Thus, Combs did testify that he wanted to get Brown & Root organized. *But he also testified the only way to get (them) organized is to go in there and go to work, to be an organizer and do his job as organizer before work, during dinner, and after work*. Finally Combs testified that he would like to see every company in this country union, and he would like them all to be Boilermakers, because that is his union.

Combs recalled Johnson interviewed him. But Combs ambiguously as to when and who (if not combining the interviews) testified that they went through his qualifications and talked to him about it, and then asked him why he would put his union affiliation down as an organizer. He had put ''volunteer organizer'' down because he wanted to get the job down there organized. When he was asked why that was on there and he just told them, ''That's what I wanted to put on there. I wanted to go in and organize.'' And go to work, that was it; that was all. They said, ''We'll give you a call.'' But they did not. Combs called Job Service after that, but just about work, not about his Brown & Root application.

Though Combs did not attend the fight back seminar, Combs had previously participated in organizational activity before when he was employed in nontrade work. As a volunteer organizer he understood he would go to work for a non-

union contractor or nonunion company and, in his spare time, he had all the right in the world to ask people to sign pledges as union members, to sign signup cards and to promote the Union to the people that are working there—on his own time—before work, dinnertime, and after work. Combs added, however, while I am there, I do my job.

(9) *Charles Fisher*. Employer contends that Fisher applied because the union hall told him to apply and to help organize and that Fisher made a vague reference to wanting a job, but he had been employed elsewhere until the day before his application.

Fisher applied for employment by Brown & Root on September 21, 1989. As Fisher recalled, he talked to just one interviewer. Fisher had been a welder for 15 years and he testified that *he was seeking to be employed as a welder*. They discussed what skills he had and what skills he would need to have to be hired. Fisher testified that he had been out of work, initially did not recall how long, but not long, possibly a month, but then acknowledged his application indicated *he was laid off from Willow Island the day before. When asked when he would be available for work, Fisher said immediately*, and his application corroborates it. Fisher also testified that Brown & Root never contacted and offered him a job and, if they had contacted him, he would have gone to work for Brown & Root.

Fisher otherwise testified that *he learned of the job from his union hall, who told him to go on down and submit an application* and to write voluntary union organizer on it, which he did. Actually, Fisher put on his application, ''Boilermakes Local 667 Volunteer Organizer.'' Fisher also testified initially somewhat reluctantly that he did not know whether one of the guys from Willow Island told him, or whether McCormick did, adding McCormick may have. Fisher testified on reflection that he thought McCormick did tell him to put the language on it. Fisher also listed his Union's officials as references, because they know his work.

Though it appears he did not attend the seminar(s) because he was out of town, Fisher understood fight back to mean *trying to keep our construction organized, and he affirmed he would characterize fight back as a strategy to organize the nonunion contractors*. He did not know what they were paying; but *he would have gone to work for them for a job for one thing*, and hoping that maybe we could organize. It is clear enough Fisher (and others, e.g., Griffith next) was jointly motivated to secure employment and organize.

(10) *Roger Griffith*. Employer contends that Roger Griffith applied because ''I volunteered to help be a [sic] organizer for the Union.'' Griffith explained that he applied for a job at Brown & Root, because he had heard some people talking about it, and *he was not working at the time*, so he called the hall to see if he could help.

Griffith is a boilermaker with 12 years' welder experience and secondary preference in rigger-burner work. (A rigger is someone that hooks up material to be lifted by a crane or cherrypicker or things of this nature. A burner burns or cuts up metal.) Griffith did volunteer to help be an organizer for the Union. He asked McCormick if he could volunteer to fill out an application for employment to help organize Brown & Root if he was hired. McCormick said it would be fine, and he should put volunteer organizer on his application. Griffith put ''Boilermaker Local 667 Volunteer Organizer'' on his application.

Griffith asserts he put it on because he was a truthful person. Griffith did not attend any fight back meetings, but he recalled that he was told that he would be instructed, if he was hired. Griffith knew a volunteer organizer is someone that tries to bring the benefits of the Union to the attention of people working there. He was told he could use the names of union officials as references on his application, which he did.

Griffith was never contacted by Brown & Root, and he has testified that if contacted, he would have gone to work for Brown & Root. Though aware that Brown & Root was nonunion and paid less than contract rate, he would have gone to work for Brown & Root *because he could have used the money*, and he was going in as a volunteer organizer, because he believes in the Union and that we have representation; we do not have to be afraid of our jobs; we have safer working conditions; and we have a better wage scale.

Griffith recalled the interviewer identified himself as from Brown & Root. Griffith recalled, however, they were in a large room, and the interviewer had called Griffith up to his desk, located in a little cubicle, where he reviewed Griffith's application, which suggests a recalled interview by a Job Service agent. Griffith recalled the interviewer said looking at your application, it looked like he would be well qualified for some of the job openings, a comment that Johnson has testified he would not make. On the other hand, Griffith also recalled the interviewer had talked a little bit about jobs available, about the benefits, the work for the Company, and he recalled the interviewer had said Griffith might have to take a welding test, might have to get a haircut and shave his beard; subjects that Johnson has addressed in an interview. I am in the end persuaded that Griffith was more probably interviewed by both.

(11) *Rodney Hale*. Employer contends that Rodney Hale was not sure if he was unemployed when he had applied at Brown & Root, and he applied because McCormick *''asked if I would be interested in going up there and putting in an application to see if I could get hired*.''

Hale applied for employment with Brown & Root at Job Service on September 21, 1989. Hale related initially that at the time *he was looking for a job*, and McCormick asked Hale if he would be interested in going up there and putting in an application to see if he could get hired. *At one point Hale did testify that he did not recall whether he was employed or laidoff, but then he also testified that he did not think he was employed. Hale also declared on his application that he was available for work immediately*. Hale testified that his next job was in Ohio, where he had to go (through Local 667), because there was no work for him in Charleston. Hale testified Brown & Root never called him and, if they had called him to go to work for them at Rhone-Poulenc, he would have to organize them.

Hale affirmed that he put on his application he was a ''Boilermakers Local 667 temporary organizer,'' and that McCormick had told him to put that language on his application. Hale's understanding for doing that was that we were going to try to organize those people for (sic) Brown & Root. His understanding of a temporary organizer was someone who is to organize a nonunion contractor. Hale had no formal training as an organizer, but had previously obtained signatures on authorization cards ''from various places.''

Hale attended the fight back seminar, whose general purpose was to organize the nonunion contractors.

(12) *Ira R. Jeffers*. Employer contends that Ira Jeffers' only reason for applying was to organize Brown & Root. In this instance, Employer's claim appears more supported.

Though Jeffers testified that he believed that he was unemployed at the time, he also testified that it *would not have mattered. He would have quit a job to go in there. Jeffers stated there were two reasons he applied: (1) McCormick had asked him to and (2) to organize Brown & Root, and to work to the best of his ability, and as hard as he could to show Brown & Root that we have qualified people here, and can man their work; that they do not have to bring people in; and that we have contracts that they can be signatory to.*

Jeffers testified that as long as it was okayed by the business agent through the International they had a right to go in and organize on any job. Jeffers recounted in that regard that Brown & Root had come into the area where they work; they have qualified people to send to Brown & Root, if they wanted to become signatory to our contracts, and they could perform the work probably more safer (sic) than what they can, because we know the plant or any of these plants around here. Jeffers explained (his understanding), when any nonunion contractor comes in here, they bring people in that they normally work at their companies all the time, but then they will come and hire locally around here, and work these people for less than what these other guys they bring are paid.

Jeffers stated he could go in there and at least maybe make their lives better and, if they did organize and become signatory to the contract, they at least would be getting the same pay. Jeffers also testified, when you go into these chemical plants, you were breathing the nastiest stuff on this earth, not only the products that they make, but like the asbestos that is all in there, so he felt that they should all get paid for it, and not bring the people in there off the street that do not know anything, or about the dangers that are in there.

Jeffers also related (his view), they were living substandard to what they were use to in this valley. When they come in there and they were paying somebody $7 or $8 an hour, when it is hard to make it on the $17 or $18 an hour, so they would do nothing but benefit as far as the working man, and he was sure these contractors were all making the same amount of money. These other (union) contractors make money doing it; they can do it, too.

Jeffers had attended the Boilermakers fight back campaign. He affirmed part of it was on the subject of organizing nonunion contractors. He recalled that Newton Jones, Tony (sic) Mobley, and Tony Yakemowicz taught the seminar, and that it just basically told you what you did. You went in there and you got the nonunion worker to sign cards to get up an election so that they could represent them, if they chose. And, you do this on your time, not (on) companytime. You go in early and you meet them in a parking lot or just talk out on the street, or at lunchtime, or after work, or meet them somewhere.

Jeffers confirmed many other boilermakers, that they were also told, the days of holding a picket out there and throwing rocks, being violent and stuff, is over. You hire in and try to organize them. That is the only alternative that you have, because you can get out there and stand with a sign all day in the rain and snow, or chuck rocks at a car, or whatever you do, and that is not going to accomplish a thing. But, if you go in there and sell these people on the programs and the things that you have and open their eyes to see what we have to offer them, that is the only way to go.

Jeffers put on his application for employment by Brown & Root that he was a ''Boilermaker Local 667 Volunteer Organizer.'' As such, he understood he would go in and talk to people about the Boilermakers union, what they could offer and the way they were treated; the benefits they have versus what the employees have; and explain our programs as far as schooling, safety, just show them that what they have to offer is much better than what the employees are working at. In no way were they to disrupt jobs. They were to go in early (and do it); do it at lunchtime and do it after work.

Jeffers was interviewed by Johnson, who reviewed his application. Jeffers testified that when Johnson got to the back side, he got kind of nervous or fidgety. Jeffers sensed a change of attitude. Jeffers had also put his local union officials individually down as references.

(13) *Larry Johnson*. Employer contends that L. Johnson's only reason for applying to Brown & Root was to organize them, and he never testified that he wanted a job or he had any personal interest in employment with Brown & Root. L. Johnson attended a fight back seminar, but did not recall when. L. Johnson summitted his application for employment with Brown & Root on September 19, 1989. L. Johnson confirmed McCormick had suggested *he could go* (to work for Brown & Root) *as a volunteer organizer*, and McCormick told L. Johnson to write ''volunteer organizer, Local Number 667'' on his application, which L. Johnson did. He also testified that McCormick said, ''[W]e'd have to do a good job if we went in there because we'd be watched closely,'' and he recalled *McCormick said, ''[N]o violence'' and ''[N]o sabotage.''*

L. Johnson affirmed there could have been more with him, but despite a probe, he remained unsure whether McCormick had spoken to him at the hall or not. As he further recalled he went down to the Job Service by himself. On arrival at the Job Service, there were three to four boilermakers there. Though Johnson thought he could remember two who were there, he recalled Morris incorrectly, as Morris filed his application on September 25, 1989. (The other Local 667 Boilermaker that L. Johnson recalled as there is not a named discriminatee.)

L. Johnson talked to an interviewer (under circmstances more indicative that he was interviewed by Brown & Root's personnel manager, Johnson), for about 10–15 minutes, mostly about his job qualifications, in which he had shown he had foreman and welder experience. L. Johnson's application states his last previous employment ended September 14, 1989, and that his availability was on October 1, 1989. He did not recall the Brown & Root man asking him if he had picketed. It was L. Johnson's understanding he would be hearing from Brown & Root, but Brown & Root never contacted him. He has testified that he would have gone to work for them.

(14) *Rodney Lamp*. Employer contends that Rodney Lamp gave only one reason for having applied: ''Our BA [Business Agent] wanted some union organizers to go in and take a job

with Brown & Root and try to organize,'' and Employer asserts that he did not even testify that he was out of work when he applied.

Lamp had testified, however, that *he was unemployed at the time, though he has also testified that what motivated him to apply for employment with Brown & Root was his union, or Business Agent McCormick, wanted some union organizers to go in and take a job with Brown & Root, and then try to organize*. Lamp then asserts (ambiguously) he did not know of any restriction that would prevent him from applying and going to work for Brown & Root. In his application (on the back page) under ''List Special Skills or Equipment Used, Years of Experience,'' Lamp (as did others) wrote ''Boilermaker Local 667 Volunteer Union Organizer.'' Lamp asserts he wrote it because that was what he was going to do.

Lamp initially asserted (unconvincingly) he did that on his own without anyone telling him to do it. On examination by Charging Party Boilermakers International, he then related he did not recall whether McCormick, or Thomas, had told him to put that on his application or not. On the weight of more credible evidence, I find it far more likely that McCormick (or someone at his direction, whether Bush or Thomas) had instructed Lamp to do so, just as it is clear many others were so instructed by one of them, but mostly McCormick.

Lamp testified that he was interviewed by a person that identified himself as from Brown & Root, but whose name Lamp could not remember. Lamp had years of experience in heliarc (TIG) and stick welding, etc., and they discussed it. According to Lamp, the Brown & Root interviewer had said *Lamp was the kind of person he was looking for, and the more he could do in that line, the more he would be paid*. The man told Lamp that he would get ahold of us. When the interviewer finished, however, he yelled Lamp's name again. Lamp, exiting, said, ''Well that's me.'' It was apparent to Lamp at the time that the Brown & Root interviewer had the wrong application before him when interviewing Lamp. Lamp recalls that the interviewer then said, ''It really didn't matter.''

Lamp got a copy of his job application and left. He asserts he got one because he wanted it, not because someone told him to get one. Lamp testified any time you go to Job Service you ought to get a copy of anything you take, as that is the way you got proof you did apply for a job. Lamp also related (ambiguously) if he got a job, he was not instructed to do anything. Lamp did testify clearly he would have taken the job, and he would have crossed the picket line to do it.

(15) *Roger L. Marion*. Employer contends that Roger Marion never testified that he wanted a job or had any personal interest in employment with Brown & Root. Marion applied for employment with Brown & Root on September 21, 1989. Marion has inaccurately related he had applied the same day as Morris (rather than Cronin), who had just testified. Marion heard about the job from his union representatives at the hall, though he could not recall whether he was at home or at the hall at the time. Marion believes that it probably was Bush who told him, but it could have been McCormick. It is more likely, if it was not at the hall he first spoke about it, he was at least later at the hall with others present, though he also recalled he spoke to Bush or McCormick alone.

In any event, Marion affirmed that McCormick, or Bush, had told him to write ''Boilermakers Local 667, volunter organizer'' on his application, which he did. He related, they said if we were hired, we would try to organize the job, so he supposed that would just put everything in the open. Marion relates they did not tell them to, but said we could list them as references, and so he did.

Marion went to the Job Service to apply for the job by himself. When he arrived there were some other boilermakers there, that he (later) estimated (unsurely) were 8–10, but he could not recall who they were. Marion explained (plausibly), I see these people from time to time on job after job, different ones all the time, I just cannot recall who was there at what time. Marion recalled that at Job Service he was taken back for an interview that was pretty quick. It was not left that Marion was to call back about the job, so Marion supposed the interviewer, whom he believed worked for Brown & Root, was to call him. At the time he knew Brown & Root paid less than union scale. He, however, *had worked before for less than scale for about 4–5 months (in 1984) after a long period of no work*. Marion stated on his application that he was available present(ly). Marion also testified that if Brown & Root had called him for a job, Marion would not have turned the job down.

(16) *Martin, Kenneth*. Employer contends that Martin gave only one reason for applying: ''To organize.'' Martin testified from his date book that *he had been unemployed since September 8, 1989, and was at the time he applied*. Martin learned of the job through his union hall (and a newspaper article, rather than a newspaper ad) as he later recalled that he had just got back into town, and that same morning *was at the hall looking for work*, and they told him about it.

Martin filed application for employment on September 21, 1989. Martin recounted McCormick was getting a bunch together to do it. Martin confirmed that McCormick had told him (in a group of 10–12) to go down and apply and put ''Boilermaker Local 667 volunteer Organizer'' on his application, and Martin did. They did not go (down) as a group, but individually, and when he arrived there may have been one or two of the group already there. In his interview with Brown & Root (Johnson), Martin recalled that they discussed his qualifications as a welder, mechanic, and he could do about (any) type welding that they needed—carbon or arc guaging, burning, whatever.

Martin testified that he did remember recontacting them just to make sure, and he believes they just said that they had his application in with them, but that was all they said. Martin did not recall the individual's name that he spoke to, but he believes it was Brown & Root. Martin affirmed that Brown & Root never contacted him to offer him employment, and he would have gone to work for Brown & Root to organize.

(17) *Raymond Morris*. Employer contends Raymond Morris never testified that he wanted or needed a job or had any personal interest in employment with Brown & Root. Morris knew about the job from seeing it in the paper, and the Union told them about it. Morris applied for employment with Brown & Root on September 21, 1989. McCormick had told him about it probably the day before. *At that time he was unemployed and available for work*. He was interviewed for 5–10 minutes about what work he had done by an individual taking applications for Brown & Root. Morris thought (correctly), though not sure, that Hudson was there at Job Service when he arrived, and thought (incorrectly) that

Dougherty was. (Hudson filed his application the same day as Hudson, September 21, 1989, but Dougherty signed his application on September 25, 1989.) Morris testified if Brown & Root had called him, he would have taken a job with them.

(18) *Donald Mosteller*. Employer asserts Donald Mosteller in his testimony was less than certain he would have accepted a job with Brown & Root had it been offered, as he could say only that (during the entire period of picketing) ''possibly'' he would have taken it and, though Donald Mosteller said he would have crossed the picket line, he admitted he had never crossed one before. Donald Mosteller, however, also credibly testified that *he was unemployed at the time he applied, that he needed the job or employment*, that he thought he could help by going in there and being an organizer, and that he spoke to McCormick because he understood he could not work for a nonunion contractor; McCormick said it would be alright; he was to put voluntary union organizer on it (the application); and McCormick said, ''[I]f you get a job, you get a job.'' (Mosteller did testify that the duties of a Boilermakers volunteer organizer were to try to get the people organized into a union, and his main object on hire would be to organize them into a union, organized labor.)

D. Mosteller filled out his application on September 21, 1989, which was the same day he went down to the Job Service. He put ''Volunteer organizer L U #667'' on his application. To the extent Mosteller has elsewhere asserted that he put it on as his personal idea, that assertion is not credited (in any sense other than he did so voluntarily). Otherwise, I credit his testimony that no one said anything to him about the Union compensating him or paying expenses if he went to work for Brown & Root. Moreover, I also credit his recollection that the (Job Service) guy that interviewed there at the job center said that they were looking for skilled workers to come in there. Apparently another Job Service agent told him that they needed skilled workers, that they did not have them, and that she was glad that we came in. At least James Hudson (and Mike Wise) was there at the same time with Mosteller and, on weight of evidence deemed the more credible, I find each filed an application on (September 21, 1989). To the extent, however, D. Mosteller asserts his understanding from that was that they were going to fill positions regardless if (sic) they were skilled or unskilled, I do not credit that as a necessary consequence of what was said.

D. Mosteller asserts he asked for a copy of his application because after signing and putting his social security number on it he felt he had a right to it. Be that as it may, D. Mosteller more reveals his operative motivation in seeking a copy, in additionally testifying since Brown & Root has a (certain) relationship with union labor (a company nonunion policy) and, since he was a boilermaker (he felt), maybe his application might not make it to the file. Johnson initially refused to make a copy of the application for Mosteller, but Mosteller pressed it.

D. Mosteller had read a lot about Brown & Root's being an unsafe contractor in the newspapers. It did not effect him any on accepting (sic) an application of a job. But it had kind of concerned him about safety, i.e., working in a plant like Rhone-Poulenc with nonskilled labor, people (hired) off of street or something like that. He would rather have people like him working in there than he would for them (sic). He did not call or write Johnson after he had filled out an application, because he just figured if Johnson was in need of qualified people that he would get a call to go to work.

D. Mosteller also credibly, if hesitantly, testified he was prepared to cross the picket line, though he had not ever before. D. Mosteller had also testified on inquiry that he was not aware of the Boilermakers position on whether or not they should cross the picket line at the Rhone-Poulenc facility in order to go to work if offered employment at Brown & Root. Mosteller had attended (I find) the Boilermakers International's fight back seminar in February 1989, at Boilermakers Local 667's request at the Civic Center on organizing. Going into work (thus crossing the picketline) for organizational purposes in such circumstances was the Boilermakers' policy understood by many individuals. Assuming he did not know Boilermakers' policy, had Donald Mosteller been offered the job (I find it then only reasonable, if he then felt the need), he would have made the inquiry of his union on that matter, and he would have then been so informed (whether or not earlier so informed). Employer's argument that D. Mosteller was not a bona fide applicant because of hesitation to question put to him on his elective choice on crossing a picket line is without merit. (In related sense the choice is always the employee's, see *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).)

(19) *Randall Pierson.* Employer says Pierson applied because McCormick ''asked me if I would and I said 'Yes.''' *Pierson, however, had been laid off the day before* and that morning at the hall (with Elliott) McCormick told him (and Elliot) they had a job available. *McCormick asked Pierson if he would go down and apply, and Pierson said, ''[Y]es.* Pierson drove down to the Job Service with Ron Elliott to apply for employment with Brown & Root. He was aware that Brown & Root was paying less than the union scale at the time he applied.

Pierson testified that he filed his application for employment with Brown & Root on September 20, 1989. Pierson wrote on his Brown & Root application ''Boilermaker Local 667 Volunteer Organizer'' as McCormick had told him (and Elliott) to do. (The record reveals that the only other time Pierson had so applied was very recently with another employer.) Pierson testified that if called he would have gone to work for Brown & Root, and he would have gone to work for less than union scale *to get the job*, and he had intentions of organizing once he got on the job.

(20) *Raymond Smith*. Employer contends Smith never testified that he wanted a job or had any personal interest in employment with Brown & Root. Although Brown & Root did not advertise in the newspapers, radio, and TV, there were notices (articles) in the paper on their hiring, and Smith testified that the Union told him they were hiring. The record shows that *Smith was unemployed* and has testified he would have accepted a job if offered, that the Union told him Brown & Root was hiring. Smith knew about a constitutional prohibition about a member working for a nonunion contractor, but also that *if you are a volunteer organizer, that is how you do it; that his business agent had told him it would be overlooked if you are a volunteer organizer*; that he subsequently filled out an application at Job Service, and he wrote ''Boilermaker Local 667 Volunteer Organizer'' on his application because McCormick suggested it, and he wanted to go in there and organize. (Smith also wrote on his application

that he had been a boilermaker 21 years and a boilermaker welder for 10 years.) Moreover, Smith recalled that it was about a month before he received any further (later) employment through the hall.

When Smith asked for a copy, Johnson (first) said he was not allowed to use the copy machine. He went and asked the (Job Service) manager, if he (Johnson) had been using the machine, and if he could make Smith a copy. She (Job Service) said she had no problem if he wanted to make Smith a copy. Smith returned to Johnson over not getting a copy (telling Johnson) Job Service had said they had no problem with his getting a copy. Smith explained Johnson had made copy for others that day, and Smith was questioning why Johnson would not make Smith a copy. Smith asked for the application. Smith then stated he took it (the application) outside and looked for a place and did not find one and brought it back and asked Johnson for a copy. Johnson said he had been using the copier earlier that day but he was not going to anymore. Apparently Smith did not get a copy. He did not turn one in to the Union (G.C. Exh. 7 series).

Smith initially asserted that he had filed applications with nonunion companies, but so long ago that he does not remember. Corrected in that regard, Smith acknowledged that he did file an application for Ultra Systems Western Constructors (later) about 4 months ago, and he did so with the same object in mind as he did with Brown & Root.

(21) *David Sprouse*. Employer contends that David Sprouse never testified that he wanted a job or had any personal interest in employment with Brown & Root. Sprouse filed application for employment with Brown & Root on September 20, 1989. Sprouse went down to Job Service alone. There were several people there when he arrived. He saw some boilermakers there whom he did not recall, and there was a lot of people there whom he had never before seen. McCormick previously told Sprouse to put ''Boilermakers Local #667 Volunteer Organizer'' on his application, and he did. Sprouse had not attended Boilermakers International's fight back seminar put on for Boilermakers Local 667 at the Charleston Civic Center because he was out of town (though he has since filed an application with another nonunion contractor which he identified of record as Ultra Systems).

Sprouse testified that Brown & Root never called him, and he would have gone to work for Brown & Root. Sprouse explained if he went to work for them, he would have tried to make them safe, as far as his work goes, adding, I do not work unsafe. Sprouse denied that he thought organizing them into a union shop would necessarily make them safe.

It is apparent from the above that as many as 17 of the 21 named applicants, thus excepting arguably 4, Combs, Jeffers (clearly), L. Johnson, and (possibly) Lamp, exhibited a condition of layoff and/or opportunity to secure employment as a factor for consideration. It seems to me that it is irrelevant as to what legal reason may have motivated applicants to seek employment from Employer, so long as the applicants are seeking employment in good faith, which I find all of the above (and the others were).

There are certain difficulties in summarizing the circumstances of the 48 named applicants, which the parties encountered in their briefs. Individual summary of testimony of the remaining individual applicants is representative of the factual issues raised in various contentions and will serve as adequate base for conclusions to be drawn below. In general, the testimony of all the boilermaker applicants was consistent in substantive respects, but not always.

(2) The status of the other applicants—commonalities

Joe E. Asbury. Asbury went to Job Service by himself and submitted an application to Brown & Root on September 20, 1989, *because he was unemployed*, having just been laid off the day before from a job at Willow Island, West Virginia, where he heard about the job from some friends. Asbury applied because *he was looking for employment; he wanted to get a job close to home with steady hours, but he also wanted to try to organize the people over there and try to create a safer environment*. As he recalled, others who went down to apply were Dan Dougherty, Charles Fisher, Earl Mosteller, George Pinkerman, and David Sprouse. E. Mosteller, Pinkerman, and Sprouse confirm they filed their applications on the same day, September 20, 1989. I find that Asbury had an erroneous recollection on Dougherty and Fisher (who confirm they filed their applications on September 25 and 21, 1989, respectively).

Asbury put on the back page of his application that he was a ''Volunteer Organizer Boilermakers #667.'' When asked why he put that on his application, Asbury initially answered, because he had listed all of his qualifications and references and intentions on the application, and he would have liked to seek employment there and try to organize those people. Asbury later acknowledged he had spoken to McCormick about it (applying for Brown & Root employment), and McCormick said, ''If that's your intentions, please put it on there.''

Asbury testified in his interview with Brown & Root, Asbury stated his qualifications in different types of welding, with varying 5–9 years of experience, and the interviewer first said Asbury was just what he was looking for. (Asbury had also attended heliarc welding school. He has taken several different tests and, most generally, the pipe tests are, you have to heliarc, and then use your stick, your arc, and the test are lots harder than the actual job.) Asbury relates that the interviewer turned the page over, and he read further, and then said, he will call if he needs me, or, ''If we need you, we'll call you. You can leave.'' Asbury testified, ''I was under the impression that I had a chance for employment before he turned the page over. I'll say that.'' Asbury also recalled that he was told what the wages were for A welder and B welder (though he did not recall by whom there), and he knew the Brown & Root wages were a little lower.

Asbury also testified that Brown & Root never called him and, if they had, he would have gone to work. Although he has never worked for less than union wages before, Asbury explained, *this plant is a mile from his home; it is a steady paycheck every week*. In contrast, in his present work, he never knows when he has a job or when he is getting laid off or when he is going to be away from my family 2, 3, or 4 months at a time. He never knows how much his income is going to be in a year or how much it is going to be in a month.

Asbury had attended the fight back seminar earlier that year. Asbury did not recall Brown & Root being mentioned, nor did he recall anything said about writing on an application about being a volunteer organizer. He did recall a talk by Conrad Mobley (International) who talked about, if you

were to be on a job, to put the thoughts in the workers heads that they can organize if the need be or, if the desire be there, just to do it, and stay out of trouble with the contractor as far as not being a troublemaker, keep your nose clean, do not come in late, or leave early; do not extend your breaks; do not keep a shotty (sic) atmosphere in your work area, and do not steal tools or whatever that may upset anyone.

He did not receive any special training as a volunteer organizer. If he went to work at Brown & Root *he intended to earn a living for his family, keep his nose clean, and work hard using his past experience and qualifications, and when he had time from his job or had a work mate (sic), casually mention to him, when the time was right, have they ever thought about organizing*. Asbury explained he has worked union and nonunion, and he knew the benefits of both, and that he could sit down and discuss it with anyone, if the situation arose.

Herbert Barker. Though not sure, Barker testified he believed that he was unemployed when he filled out an application for employment with Brown & Root on September 25, 1989. (Barker's application confirms he said at the time that he was available September 25, 1989.) Barker saw in the newspaper that they were hiring, and he had also heard about it on the job. Barker went to the Job Service by himself to apply. Other boilermakers were there, but he could only recall Dan Dougherty.

On his application Barker stated boilermaker as his first preference and pipefitter as second, explaining that boilermakers do more heavy rigging and pressurized welding than pipefitters. Barker explained that some boilermakers weld, and he can weld, but he acknowledged that he was not a certified welder. Barker testified that he was not called by Brown & Root and, if they ever had called him, *he would have gone to work for them, even below scale, because it was right at the house for him, and the scale is not that low*. When inquired of as to why he would want to work for a company that he considered unsafe, Barker answered, because I do not work unsafe and that he would try to get the other guys to work safe too.

Barker stated he was a ''Boilermaker Local 667 Volunteer Organizer'' on his application, and he thought that McCormick had told him to write it on his application, a few days before, probably in the hall and, if they get hired, try and talk to the people and organize them. Barker had attended the fight back seminar at the Charleston Civic Center, but he did not recall that (putting the volunteer union organizer language on the application) being discussed. Barker testified that he did not talk to Bush, but probably talked to other boilermakers about it, but he could not recall who.

Michael Butcher. Butcher filed an application for employment at Brown & Root on September 20, 1989. He had earlier attended the Boilermakers fight back seminar, that he recalled was a year or two before he applied. He testified that he knew at the time that Brown & Root were taking applications because McCormick instructed him to go there to apply for a job, said they was needing welders. Butcher was in a group that he estimated was 15, but that he only recalled (by name) had included Bob and Jerry Wallace (sic, Wallis) that he rode up with. Butcher testimony clarifies: ''[T]hey said that there was a job there; apply for a job, you might get work there.'' He recalled that at the time work had been slack. Butcher affirmed McCormick asked him (and he believed asked the others) to write ''Boilermaker Local 667 volunteer organizer'' on his application, which Butcher did.

Butcher was interviewed by a man from Brown & Root. During the interview the man indicated he needed welders, high pressure welders. Butcher's application reflects his declared experience as a ''Pipe welder, heli-arc 13 years.'' Butcher testified after his interview it seemed the guy said something like Butcher could fit his needs, but then had left it open in getting in touch with him.

At the time Butcher applied, he knew that the job paid less than union scale. Butcher testified that had he been called and offered a job there, he would have gone to work there, explaining, ''Well, like I said, at the time I went there—well, things haven't been that great around here, if I'd a got to work in there all that time, that would have been a pretty good job.'' He also testified that he would have gone to work for a company he thought was unsafe, ''Because I'm very well qualified at the trade I do. I'd been good for their—for that craft.'' The interviewer did not ask Butcher if he had picketed.

Stephen C. Carpenter. Carpenter, a member of Boilermakers Local 667, was *out of work and needed a job*. Carpenter was never told you could not take a nonunion job; he had just assumed it. But McCormick told Carpenter that they were going to make an organizing drive at Brown & Root, and he relates that McCormick encouraged him to apply for work there. Carpenter then applied (on September 21, 1989). He is fully qualified to perform pipefitter (welding, rigging, and fit-up) work, and he has testified that if he had been offered a job there he would have accepted it, even if it paid less than prevailing union contract wage, which he understood it did. (Carpenter's understanding was Brown & Root paid from $6 an hour to $14–$15 an hour. He also has confirmed that he did not expect the difference between what Brown & Root would pay him and union scale of $17.01 would be made up.) They, however, hoped to have a successful organizing drive down there.

Carpenter spoke to the Job Service receptionist, but he did not consider that an interview. Notably he confirmed that Jim Skeens and a number of other boilermakers were there. McCormick had told Carpenter to write ''Boilermaker Local 667 Volunteer Organizer'' on his application, which he did. He next spoke to a Job Service lady, then waited and went back to talk to Johnson in a small room with floor to ceiling partitions at the rear of the building. (Carpenter was interviewed by Johnson, whom he identified.) Carpenter initially related as in his mind that Johnson had said that he was (clarified in sense would be) hiring pipefitters and carpenters. Carpenter, however, later testified (notably more supportive of Johnson's usual interview) that Johnson did not mention the specific crafts they would be hiring. Carpenter asked for and Johnson gave him a copy of his application, which Carpenter turned in to the Union, to Bush.

Carpenter thinks his next job was in October at Glasgow, West Virginia, obtained through the hall, and it paid scale. Carpenter, however, has testified that if (earlier) hired, he would have stayed working at Brown & Root, as he has never quit a job. Carpenter confirmed there are various jobs: some pay 100 percent, some pay 90 percent (a rate specifically negotiated so as to be competitive with nonunion competition), and some pay less. Carpenter has testified that when you accept a job you are expected to be there until the

job is completed. His reasoning was to do it (apply and work at Brown & Root) in order to organize and turn that job into a union job.

Paul R. Cox. Cox testified he applied (on September 20, 1989) because his *job was about over, and he wanted to stay close to home*. McCormick told him about the job, that Brown & Root was hiring, about a week previous. McCormick also reminded Cox to put volunteer Boilermakers Local 667 organizer on his application. (Cox attended fight back, and he recalled that was part of the fight back program.) In his interview they discussed his qualifications.

Jeffrey Cronin. Cronin submitted an application for employment with Brown & Root at the Job Service on September 21, 1989. Cronin testified he heard from friends Brown & Root was hiring down at Rhone-Poulenc, and Cronin called his union hall about it. McCormick (or Bush) said, ''[Y]es, *if you need work go ahead and apply for the job;'' and, McCormick (or Bush) then told him to write ''Boilermaker Local #667 Volunteer Organizer'' on his application, which he did*. He also listed local union officials as references, not because he was told to do so, but because they knew his capabilities. A man that he was pretty sure was with Brown & Root and, as he recalled, who said he was, discussed Cronin's welding qualifications of 10 years in an interview lasting a couple of minutes, during which Cronin told the interviewer that he could do pretty well anything you got to do. The man replied we will be in touch with you, but never did. Cronin knew the job paid less than union scale, but *he was looking for, and needed work*. Cronin affirmed that he would have taken a job at Brown & Root if they had called and asked to come to work (saying or) he would not have applied, and Cronin affirmed he intended to organize if he went to work at Brown & Root. After that, from time to time, Cronin secured other employment.

Steve L. Dew. Dew has been a member of Boilermakers Local 667 for a number of years. *Dew was unemployed and immediately available for work*. Dew heard they (Brown & Root) were hiring, and he called the hall. Bush said he thought that they were. Dew then applied for employment with Brown & Root on September 25, 1989, and he wrote the words ''Boilermaker Local 667 volunteer organizer'' on his application (just as some others were instructed to do by McCormick and/or Bush), asserting, because if he was hired, he wanted to try to organize the workers.

On his application Dew listed his previous employment as with Boilermakers Local 667, though he did so with stated claim of having 13 years of experience as a boilermaker mechanic and rigger. Dew acknowledged that Employer asks an applicant to list prior employment so that the Employer can verify it (claimed experience) and to find out if the applicant was a satisfactory employee. Dew said, however, he put down the local union because he works out of the hall, the employers that he works for are just too numerous, and they (Brown & Root) could have checked that (his employment history) with the Union and got more information. Dew testified he was interviewed by Johnson (who notably did not request that Dew be more definitive in filling out the application).

Dew has otherwise testified that he would have accepted work if offered by Brown & Root. He would have gone to work there to get our people in there and make it safe. Dew testified that he thought Brown & Root's unskilled labor was unsafe. He had heard rumors about it and, down on the picketline, he would read something about an accident in a Texas paper, or some paper out west. Dew obtained his next job through the hall, probably a month later.

Dew testified he had not attended the February 1989 fight back seminar program that the Boilermakers International put on locally. Dew asserts Bush had given him no instructions and, supportively, Dew did not ask for a copy of his application. Dew was not open and considerably less persuasive in his assertions that he did not know of any union restriction on working for Brown & Root (a known nonunion contractor), or he did not recall if some Boilermakers offical had told him to put volunteer union organizer on his application or that he does not know how he came to write volunteer union organizer on the application. Neither do I credit the Dew assertion that he did not subsequently call or write Brown & Root because he thought maybe they'd hired everybody they were going to hire.

Dan Dougherty and J. Hudson Sr. Dan Dougherty had 9 months' rigging experience at the Dupont plant at Belle, and he was a graduate of Boilermakers apprenticeship program, with some 6000 hours obtained in 3 years. Dougherty recalled that McCormick spoke to him about it (applying at Brown & Root), but he testified it was Bush who told him that when he signed his name (on the application) to put ''Boilermaker Local 667 Volunteer Organizer'' (which he did); and *Bush then told Dougherty that if we got in there that we was going to try and organize*.

Dougherty put on his application that he was a ''Boilermaker Local 667 Volunteer Organizer.'' He testified that he was trying to organize Brown & Root because *his main concern was for safety of the people in this valley*; adding, he had lived in this valley for 39 years, and his family, probably 80 percent of the people he knows, lives in this valley.

Dougherty, however, who *had just been laid off (1–3 days before) when he applied, has also testified that he would have gone to work for Brown & Root, because, for one thing, their scale for a welder is very comparable to union scale*. He recalled at that time it was within $2–$3 and they had $30–$35 subsistence pay, which brought it up to scale; adding, he would have gone to work for them to organize them. In that regard, Dougherty has testified that he believed it is just common knowledge Brown & Root was one of the largest nonunion contractors in the country. Dougherty also testified *there's a lot of people around here unemployed* and when there is somebody hiring, just about everybody knows. He confirmed, the word from the hall was to go down there, and we were going to try to organize down there.

Dougherty lives within 1 to 1.5 miles of a Dupont plant located at Belle, West Virginia. He identified a Charleston Gazette newspaper article dated May 25, 1990 (C.P. Exh. 13), that reported Dupont officials had signed a multimillion-dollar construction contract with Brown & Root as one that he had read. That article also reported to the Charleston community:

> Brown & Root was charged May 1 with federal safety violations for infractions at Rhone-Poulenc's Institute plant. The nonunion contractor was cited with several serious violations in connection with a Feb. 2 leak of deadly methyl isocyanate vapor.

> The U.S. Occupational Safety and Health Administration fined Brown & Root and six other firms a total of $5,710 in connection with the release that injured seven workers. OSHA penalized Brown & Root for failing to provide eye and face protection for workers while welding; failing to have proper guards on an air compressor, and two other serious violations.

The record reveals affirmative evidence that Brown & Root employees had no direct involvment with the MIC leak on that occasion. Again newspaper reports are not evaluated in terms of truth of the facts therein being asserted, but as establishing what (all) applicants in the community were being reasonably told. All such articles (e.g., as may be shown in circulation throughout the period of picketing) bear favorably upon the credibility of the applicants who have asserted their continuing safety concerns. Dougherty recalled that he had read other articles (available in earlier material times) on (Brown & Root) safety that had to do with a nuclear job, elsewhere noted (and see related account of Fisher below). According to Dougherty's view, arrived at from a lot of articles that he read in the newspapers, Brown & Root's safety record was a matter of common knowledge, Dougherty recalling one such article (purportedly) having to do with bad welds made on a nuclear job.

Hudson Sr., J. Hudson (and Dougherty) had attended the Boilermakers International meeting on organization put on at the Charleston Civic Center in February 1989. On September 21, 1989, McCormick did not ask Hudson to fill out an application with Brown & Root, rather, Hudson was down at the hall to ask if it was alright for him to do so. *Hudson had then been unemployed for about 3 weeks*. He has worked at construction union scale the last 10 years; and, he understood that Brown & Root was paying $12–$15 rather than the local scale of $17.01. When Hudson applied he listed McCormick, Bush and Lovejoy as references, on his own. He had been working as a boilermaker all over the United States, and (like Dan Dougherty, above) *he wanted to work at home*. The Brown & Root job was 5 minutes from his house (and 15 minutes from Daugherty's house). Hudson also related of record *compelling family medical reasons for wanting to be at home at this time*.

Hudson affirmed that he had to get permission to work, and McCormick had said he would give it. Hudson readily acknowledged McCormick had asked Hudson to put ''Boilermaker Local 667 volunteer organizer'' on his application. Hudson was to get on the inside, and help organize, which Hudson stated he was willing to do. Hudson was not told he would be compensated for doing so; nor that he would be paid any expenses, or would receive any training. Hudson convincingly testified that he turned in an application *because he wanted a job*, and if he had been offered a job there he would have taken it.

At Hudson's interview, Johnson told Hudson that they would be getting in touch with the people that they were going to hire. Johnson did not tell Hudson that he would have to pass a drug test or physical. (Dougherty recalled Johnson's stated concern was in welding, and they discussed his work experience.) After Hudson's interview, on Hudson's request for a copy of his application, Johnson told Hudson that he was not going to make copies any more. Hudson knew Johnson had done it for the man interviewed just before Hudson.

Johnson said he did not have the equipment there to do it (make copies) and that it belonged to the other people. When Hudson said he was not going to leave without a copy of his application, Johnson gave the application to Hudson to go make his own copy. Hudson got a copy made by Job Service, and he then returned the original application to Johnson. (Hudson later gave his copy to Bush at the hall.) Hudson also recalled Raymond Smith was there that day, and another individual from up North (but Hudson did not see 15 there).

At that time (after he had filed the application), McCormick also told Hudson that he would get a letter that would be put in his file giving Hudson permission to go to work for a nonunion contractor (after hire). Hudson relates, I asked the question myself, if it is alright to go to work, and McCormick said, ''Yes, it is. I'll see that a letter will be put in your file if you do go to work.'' Hudson next job after his September 21, 1989 application for employment by Brown & Root, was a 2–3-day job in November. Hudson's next (referral) employment was in February 1990, for he estimated 13 weeks.

Ronald Elliot. Elliot filed an application for employment by Brown & Root on September 21, 1989. *Elliot was unemployed at the time*, and Elliot heard that there was a job coming up. McCormick told Elliot that he could apply for a job with Brown & Root. Randal Pierson was present, and Elliot relates McCormick probably spoke with Pierson, because Pierson went down with him. Elliot affirmed that McCormick told him to write ''Boilermaker Local 667 volunteer organizer'' on his application, which he did. He was interviewed by Brown & Root. They discussed whether Elliot could weld, and he was told he probably would have to cut off his beard, and Elliot replied that would be okay. He knew that Brown & Root did not pay scale at the time, but *he still wanted a job because he didn't have a job at the time. Elliot had filed an application before with an employer that paid less than scale.*

Harvey A. Fleck. Fleck was a witness subpoenaed by Employer, who has not testified in this proceeding under the following circumstances. In arrangement apparently voluntarily undertaken by Charging Party Boilermakers International early in the proceeding to cordinate an orderly and timely call of boilermaker-applicant-witnesses subpoenaed by Employer in the proceeding that stretched out over a year, Fleck alone could not be located at time of his call. Employer urges dismissal of the complaint allegation on Fleck for that reason.

It is established that Fleck had filed an application for employment by Brown & Root on September 25, 1989, which Employer had received (G.C. Exh. 2m), with claim of having 20 years' experience as a welder. In applying, Fleck had declared himself as available ''anytime.'' Fleck had also declared that he was a ''Boilermaker Local 667 volunteer organizer.'' The Employer does not question its receipt of the above application from Fleck.

Paul D. Frye. Frye *was unemployed, wanted the job*, and would have gone to work for Brown & Root, if it had been offered. Frye was not convincing in his assertion that when they turned over his application in his interview it had killed it, since it is noted that the words, ''Voluntary Union Orga-

nizer Boilermakers Local 667'' were on the front sheet of his application. Frye put the volunteer organizer words on his application because, if he (the Employer) would (hire Frye), they would know, Frye would be a union organizer, and he was not trying to slip in. Frye is credited that Bush had told him to put it on there. Frye, who applied on September 19, 1989, had to return to Job Service on the second day, and he was then interviewed by Brown & Root's Johnson.

Frye had heard of (Boilermakers) fight back, but did not get to attend it. But he would say that being a voluntary union organizer was a part of a fight back campaign. His duty as a voluntary organizer was to just try and get a job and then inform the guys that they have a right to be organized union.

James Gerlach. Gerlach, *at the time unemployed*, signed and submittted an application for employment with Brown & Root on September 21, 1989. He had heard of the job from word of mouth that could have been on the last job he had worked, or could have been at the hall. He drove by himself to the Job Service, though there were probably 10 boilermakers there that he had worked with (recalling only Ron Elliott and Rodney Lamp, but asserting plausibly with the time passage, it was hard), and others (he did not know).

Gerlach states the interviewer did not say he was not hiring boilermakers, nor indicate Gerlach was not qualified. Gerlach related that the interviewer may have asked him how much experience he had, but Gerlach did not recall a discussion of where he had worked before that he had shown on his application, nor what position Gerlach was applying for. Gerlach put on his application he was a ''Boilermaker Local 667 organizer'' Gerlach first asserted he put that down because he thought if he got hired, he would just inform the employees of this Company (of) the benefits of organizing a union, but Gerlach also readily acknowledged that a number of days earlier, in a converstion just between them, McCormick had informed him that he should put those words on his application. Gerlach later testified that he was willing to inform the employees of Brown & Root about the benefits of organizing for a union, and that he would do that voluntarily, to try to organize the unorganized. Gerlach also testified that he asked McCormick if he could list McCormick as a reference, and McCormick told Gerlach that he could, and Gerlach did.

Gerlach had listed boilermaker, as first preference, and he described his skills as such are that he can do about any of it, and specifically that he can heavy rig, he can weld tubes, and he can fabricate. His second preference was stated as pipefitter. Gerlach testified that he calls the work tubes, and they call it pipe. He testified that a tube would handle a lot more pressure than a pipe would, but he views a lot of it as the same work. Gerlach can do high pressure welding, and he can do any welding from heliarc, meggun, stick, and oxygen-acetylene to plain plate welding. Gerlach did recall being asked if he had tools of the trade, and he did.

Gerlach testified he would have gone to work for Brown & Root, but Brown & Root never contacted him. *Gerlach testified that they did not discuss money, but for year-round work, he might work for them for less than scale*. Gerlach was hoping to turn things around, and make it better for employees, and, then there was the safety factor, as his concern, and he would go to work there to make the place safer, though he lived 50 miles away.

Michael Haught. Haught knew that Brown & Root was taking applications because it was in the papers, and because McCormick had told him they were. *Haught was unemployed*. Haught affirmed that McCormick told him to go down and submit an application to Brown & Root, and, to put ''Boilermaker Local 667 Volunteer organizer'' on his application, which he did. Haught drove down to the Job Service with Andrew Lowther. He recalled that he saw boilermakers (Raymond) Morris and Herbert Barker there when he arrived. Haught filled out his application for employment with Brown & Root on September 25, 1989. Haught had 12 years' experience as a pipefitter and also foreman experience. In brief interview that he recalled was with a Brown & Root representative ''along toward the back'' thus (I find) with Johnson, he was asked if he was a welder, and Haught replied yes. Haught testified that Brown & Root did not call him, and he would have gone to work for Brown & Root as he was unemployed at the time.

Kenneth Kelley. Kelley had 20 years of broad experience, and Kelley was certified in pipe welding with about 10 different companies. Kelley recalled McCormick told him they had an article in the paper that they (Brown & Root) were taking applications, and McCormick said that anybody that was interested could go. McCormick told Kelley that Kelley could not lie to them or deceive them, and Kelley had to put on his application that he was a union organizer. Kelley filled out an application. Kelley put ''Boilermaker Local 667 Volunteer Organizer'' on his application.

Kelley was interviewed by Johnson. Kelley relates that Johnson looked over his application real good. According to Kelley, Johnson asked him why he wanted to go to work. *Kelley said its close to home, he lived in the valley, he can use the job, he was ready to go to work, and he was concerned about some of the people that they may hire.* (Kelley added, seemingly in further explanation, if we did not get qualified people on the job, he was concerned for his family, and his own well being.) Johnson told Kelley they were hiring mostly pipe welders. He said, ''Thank you very much, and we'll get in contact.''

Kelley had attended the fight back seminar that the International put on at the Charleston Civic Center in February 1989. Kelley recalled the subject of being a volunteer organizer was discussed at that meeting, more or less. He recalled that they said, ''[I]f we were to regain our work, and keep our work, we needed to join together and help organize these nonunion people.'' He understood his duties as organizer would be to hand out leaflets, and to inform people how the Union works.

Kelley confirmed they were also given certain ground rules on how to fill out applications for employment with nonunion contractors. They were not to disrupt the job, but were to make sure that they and we work safe, and during lunch hours he was to talk to them, to help organize them, and to join the Union.

Kelley knew that Brown & Root was paying less than the contract rate, but he would have gone to work at the lower rate, *because the plant is 15 minutes from his house, and he was concerned about safety*. Kelley testified that if he could go in there and help make it safer for his family and the community, he would have done it. Kelley had heard of SAFE, but he was not familiar with it, and he never attended its meetings.

Andrew Lowther. Lowther submitted an application for employment at Brown & Root on September 25, 1989. Lowther confirmed that he went there with Mike Haught, and that Morris was also at the Job Service that day. Lowther thought there was two or three others there but he could not recall their names. They were all writing volunteer organizer on their applications (but Lowther did not recall Haught and he talking about it). Lowther affirmed McCormick told him to submit it, and that he was told, at the hall, to write ''Boilermaker Local 667 volunteer organizer'' on the application, which he did. Lowther testified that McCormick had told Lowther that if he was offered a job, to go in and do our job. *Lowther also testified that, while a member of Boilermakers, he had previously submitted an application to Union Carbide Construction, a nonunion contractor, in 1979 or 1978. Lowther explained, that at that time, we did not have any work, and he was looking for a job.*

Moreover, I credit Lowther that he was interviewed for about 10 minutes about where he worked and what his qualifications were, by someone that Lowther thought was with Brown & Root, but not that Brown & Root interviewer (Johnson), when Lowther asked when he would be called, had said that Lowther would not be called, he had plenty of applications (a statement credibly denied by Johnson). I do credit, however, Lowther's additional testimony that Brown & Root had never contacted him, and that he would have gone to work for Brown & Root if they had contacted him, to organize the Union, *and to work*. (Lowther did not attend a fight back seminar, but had heard about it from other boilermakers.)

Earl Wayne Mosteller. E. W. Mosteller applied on September 20, 1989. *Mosteller was unemployed at the time*. He did not know what Brown & Root was paying, but he was 99-percent sure that it was less than union scale. *One reason he applied was that they had work in this area close to his residence, and he had been working a lot out of town. Another reason was McCormick, his business agent, asked him if he was interested because the work was in the area, and it might be an opportunity to go to work. McCormick did not indicate in any way that Mosteller would be penalized if he did not* (Tr. 1192.)

Pursuant to McCormick instruction, Mosteller put on the back of his Brown & Root application ''Boilermaker Local 667 Volunteer Organizer.'' He testified that meant to him if you are hired on a job that is not organized, before your worktime or after your worktime, or at lunch or whatever, you might go about trying to organize the place that you are employed.

Mosteller recalled that they had people, including Newton Jones, instruct them about organizing in a fight back program that was put on by Boilermakers International in a seminar in Charleston Civic Center, that he estimated was attended by 100. He recalled that he received fight back program training that if you were hired on a job, you would try to organize a given job in your free time. They were instructed violence would not be tolerated whatsoever. He did not recall if voluntary organizer was mentioned. He understood that as a volunteer organizer, he was not compensated, nor reimbursed for any expenses.

E. W. Mosteller was interviewed (at Job Service) by one man, whose name he could not recall. It was the same man who gave him the application to fill out but he could not say it was Brown & Root. He further recalled, however, that *after* he had filled out the application, his name was called. The man looked at the application, and said he would file it. Mosteller did not talk about positions they were looking for. His understanding was his qualifications on the form would be reviewed. E. Mosteller thought it was McCormick who had told him to get a copy of his application, and he did and turned it in to the union hall. I am satisfied that it is more likely that E. Mosteller was last interviewed by Johnson.

E. Mosteller testified that if Brown & Root had offered him a job he would have taken it, and he would have crossed the picket line to accept it. In affirming that he would have gone to work for less than the union scale, he explained, *you have to make sacrifices at anything you go at, if you want betterment of an organization, or (to) make the area that you live in a better place to live*. Though Mosteller acknowledged that it is inconsistent for a union member to work for a nonunion company, he also explained the Union has provisions whereby their higher up people give them permission. They did not have the permission, but their understanding was that they would be given the permission, if they were hired.

Gilmer Mosteller. G. Mosteller is the second subpoenaed witness that did not testify under medical circumstances elsewhere shown herein. Employer urges the complaint allegation as to him should be dismissed because he failed to respond to a validly served subpoena and testify.

G. Mosteller filed an application on September 19, 1989, that was received by Employer (G.C. Exh. 2ee). The application shows he had 38 years of riger (sic, rigger) and fit-up experience and that he was available ''Now.'' G. Mosteller's application for employment with Brown & Root bears on the top of the front page a handwritten statement, ''Volunteer Union Organizer Boilermakers Local 667 Chas W.VA.''

Tim W. Oldfield. Oldfield was *unemployed at time he applied. McCormick called him at home and asked if he was interested in a job (at Brown & Root). He was*. Oldfield acknowledged that he did not normally do that, but he knew that he was going in there as a voluntary organizer, and he thought, why not. Oldfield had heard of the fight back (seminar), but he did not attend. Oldfield understood, however, if he was hired, he was to organize Brown & Root people. He put ''Boilermaker Local 667 Volunteer Organizer'' on his application. Though Oldfield initially appearing somewhat reluctant on who suggested it, Oldfield eventually affirmed McCormick did. Oldfield otherwise acknowledged that he knew (as a boilermaker member) he had to have permission to work for a nonunion contractor, and though he did not presently have it, he thought he would get it, if hired.

Oldfield also affirmed that he was willing to go to work there for less than union scale, because *he thought maybe we can turn this around and organize these people and make it a little better job, and probably make it a safer job*. He knew he would organize on his own time, either prior to work, at lunchtime, or maybe in the evening, and he knew he was not to be compensated for it and that there would be no expenses paid, whatsoever. It was on his own.

Oldfield did not identify Johnson (who was in the court room), but he knew that his interviewer was with Brown & Root. Oldfield otherwise recalled that the interviewer had acted like he had the qualifications and the experience of

people that they were looking for. Oldfield did not think the interviewer was too happy when he seen the volunteer organizer on it, but he (Oldfield) cannot judge him. When Oldfield asked for a copy of his application, Johnson really did not want to give Oldfield a copy. (There is no evidence that any one with Job Service did not want to give an applicant a copy of an application. To the contrary, it was to Job Service that several applicants went for a copy, when Johnson at least at one point had determined not to continue to supply them.) Oldfield knew he was qualified and had the experience to do their work, and (I find credibly) testified (in summary of his qualifications) that the man missed out, when he missed me. Oldfield obtained his next employment in 1989, but did not know exactly when.

Ralph A. Prouse. Prouse applied for employment with Brown & Root on September 21, 1989. At the time he applied he did not know there was a picket line protesting Brown & Root's presence at the Rhone-Poulenc plant. Prowse's best recollection was that it was 1-1/2 months, or a month, after he had applied for employment at Brown & Root that he received his next employment.

Lowell Templeton. Called as an adverse witness by Respondent, Templeton testified what motivated him to apply for a position at Brown & Root was he *was not working at the time*. Local 667 told him they were taking applications, and he was qualified. Templeton knew they were nonunion, but *he did need a job and it would be an opportunity to talk to some of the men and maybe organize*.

Like Lamp, on the back page of his application under the heading, ''Special Skills or Equipment Used, Years of Experience,'' Templeton wrote ''Boilermaker, Local 667, Volunteer Organizer.'' Unlike Lamp, Templeton testified it was his union that told him to do so, but like Lamp he could not recall who (at the hall) had done so, adding it could have been one of four people. (Templeton further explained that he did not have anybody in mind, but he was told it at the hall, and he just did not remember who it was that was there at the time that told him.)

Templeton otherwise testified that he did it (wrote the *volunteer union organizer* words on the application), because that was his intention, and so he would not be deceiving anyone as to the purpose he was there, but self-correcting it to *one motive he was there, and, stating the (other) purpose he was there was he was unemployed and needed a job*. Templeton later testified that it may be inconsistent as far as the Union is concerned as a union member, but it was more personal decision on his part to apply for this job for the purpose of *trying to organize for personal reasons and obvious reasons*.

Templeton testified that he was not familiar with the organization called SAFE. Templeton, however, testified he also felt, from the information that he had, that unqualified people were there in a very severe atmosphere, and that qualified people needed to be working in this particular establishment because of the dangers and hazards as far as the community were concerned. Templeton knew his own qualifications, and he believed that the people going in there were not as qualified to do the type of quality work they were. Templeton did not attend the fight back seminar, and he had only heard of the fight back campaign from seeing stickers and things, but he did not know the ethics (sic) of it, and his other reference to it in terms of having to make a living too appears garbled of record.

Templeton received no instructions on organizing, but he took it that the duties of a volunteer organizer would be to talk to people on the job and to explain the benefits of being organized, the better working conditions, safety conditions, what have you, expanding on considerations of the chance of a person being unqualified creating circumstances that could be very hazardous, and comparing it with his view of the value of a union's backup on safety matters. If he had been offered a job, he would have accepted it, and he (with 26 years' welding experience) could have done any phase of it (the job).

Jerry A. Wallis. J. Wallis applied at Brown & Root *because he wanted a job*. McCormick told Wallis that Brown & Root was accepting applications, and they had to have people with at least 10 years' (sic) heavy industrial work experience and good welders, and he was one of them, and *if J. Wallis wanted to work for Brown & Root, he could*. (J. Wallis attended the fight back seminar at Charleston.) Wallis testified also that since he applied with Brown & Root, he worked for another nonunion contractor, i.e., Babcock and Wilcox, International in Guam, in May 1990, for about 8–9 weeks. Wallis put on his application, ''Boilermaker Local 667 Volunteer Organizer'' pursuant to McCormick instruction.

J. Wallis, who applied on September 29, 1989, handed his application to the man, and he said, ''Well, I guess you're from Boilermakers Local 667.'' J. Wallis said, ''Yes, I am.'' He just took it and set on a pile and said, ''Okay, I'll take your application under consideration.'' Or ''Okay, that's all I need.'' J. Wallis then said, ''Well, is the interview over?'' He said, ''Yes.''

J. Wallis also asserted he knew that if he tried to organize that he would probably end up getting terminated, if he did not fill out the application truthfully. He also felt if he put it on his application it would protect him. His volunteer organizing duties were to inform the Brown & Root people about work safety and benefits through the Union. He listed union officials, who knew more of his qualifications than any body else.

Robert D. Wallis. R. Wallis' reasons for applying were stated as twofold, thus *besides the employment, to help organize*, though he related that McCormick had asked if they wanted to go fill out an application because of organization. Wallis affirmed they had a fight back program as a way of organizing nonunion, trying to get them to understand there are better working conditions and safer environment. R. Wallis put volunteer organizer on his application because that was his intent, and because McCormick told him to put it on. He handed the application to Johnson, who (after review) just laid it to the side. He said, ''I'll get back with you.''

Walker, Garrett. G. Walker filed an application for employment with Brown & Root on September 19, 1989. He knew about the job from an article he read in the paper, but also through the Boilermakers' hall. McCormick had told him one on one. G. Walker went to the Job Service by himself. When he arrived there were about six boilermakers there, but he could only recall one, Hank (sic) Prowse. (It appears Hank Prouse is not to be confused with the Ralph

A. Prouse (above) who filed his application on September 21, 1989.)

Moreover, I credit G. Walker's initial testimony that it was not McCormick who told him personally to write, ''Volunteer Union Organizer Boilermaker Local 667 Chas. W.Va'' on his application, but Thomas, outside the hall (corroborating Thomas), after G. Walker spoke with McCormick. (To extent G. Walker later has asserted that he only discussed it with Thomas, and/or later that Thomas did not say anything to him that made him think of writing this on his application, and it was his idea, under all the circumstances, I credit that only in so far as compatible with Thomas telling him what to do, and Walker agreeing to do it.)

G. Walker also testified that he applied for work there, because he felt Brown & Root was a new contractor in the area, and the main reason he wanted to go to work down there was the safety factor involved. G. Walker, a boilermaker for 22 years, testified that he thought if hired, ''then maybe I could make the job a little bit safer by having the experience that I've got.''

G. Walker applied for the position of Welder. He was interviewed by a man he identified as employed by Brown & Root, and whom he told that he had applied for the job, because he had been on the road for 22 years, and the job was within a mile of his house in Dunbar. He testified that he wanted to work for a company that he thought was unsafe, because if he would have been hired, with the experience he had in chemical plants, he would have been able to help make it a little bit safer. He had worked in that particular plant several times.

Paul E. Webb. Webb filed application for employment with Brown & Root on September 19, 1989. Webb graduated from Boilermakers National Apprenticeship Program around December 1989, but he had acumulated 3000 hours as a permit hand before he even entered union apprenticeship. *Webb was unemployed and looking for a job at the time he went down to the hall*. They said there was a job going to start and that they (Brown & Root) was taking applications. He rode to Job Service with another boilermaker (who is not a named discriminatee). Webb estimated (on the guessing side) that there were about 10–15 boilermakers there when he arrived. (There are seven alleged boilermaker discriminatees who filed applications on that day.) Webb was interviewed by Brown & Root. Webb recalled the Union said the job was at Union Carbide (which Rhone-Poulenc had purchased), which is in his backdoor.

Webb affirmed McCormick had told Webb to go down and put an application in, and to write on his application what he did, ''I am a volunteer organizer for the Boilermakers Local 667, Charleston, West Virginia.'' Webb did not know if McCormick had told the same thing to the few others (whose names he did not recall), who were at the hall. Webb understood McCormick wanted Webb to try to organize the nonunion group of people on the Brown & Root job, on his own time. Webb has also testified that *it (the job) was close to home, and he thought it would be a good job*. Webb knew the wages paid there were less than scale but he still wanted to work there because it was close to home.

Webb filled in his prior employments on his application but not the dates, as he did not recall them, explaining (plausibly) that he had not brought his own records. Webb affirmed he applied because McCormick told him to, but adding, ''*And I also needed a job.*'' Indeed, even on later return to the subject, Webb reaffirmed that he went down to apply because the Union told him to, but again testified, ''Yes, I did. But I wanted a job, too.'' Webb testfied that Brown & Root never called him to go to work, and he would have gone to work with Brown & Root, if he got called for work on the job.

b. *Preliminary analysis*

What is reasonably clear from the above is that the above applicants, for the most part, were longtime Boilermakers members, well qualified in years of experience in the trade, who almost without exception made it a point to seek initial or renewed approval of their business agent (or of his designee) before proceeding to apply for an employment with the nonunion contractor, here Brown & Root. Whether motivated, in part, as shown above, by being out of work, needing a job, needing the money, wanting to work near home, for other personal or medical reasons, and/or because they were desirous (from their respective vantage point) of ensuring safety of themselves, family, and community, the addditional fact that all the above Local 667 members responded to their local union call does not mean that they were not interested in obtaining sanctioned employment for these reasons, or their applications were not bona fide on any such account, nor so, because taking advantage of that employment opportunity, would be conditioned by their Union on their intention to organize their new Employer, when hired.

Contrary to Employer, I find the bona fideness of the applications above is well supported not only by great weight of cumulative testimony of Local 667 individual applicants, and by the mutually consistent testimony of McCormick and Thomas, but also significantly otherwise by all the below confirming and overwhelmingly supportive application documentation, which establishes not only named applicants' had stated clear interest in obtaining employment with Brown & Root, and clear qualification in skill and years of experience qualifying under Johnson's guidelines given Job Service, but, with almost no exception, e.g., excepting only possibly Butcher, who had indicated he needed a month (but who also worked in a trade that Employer admittedly had few applications in), their availability was shown on reasonably timely basis, as shown below. In agreement with the General Counsel, I conclude and find that his burden of showing that all the Boilermakers Local 667 applicants were bona fide, i.e., that they really were interested in working for Brown & Root, has been met. (The only two that arguably appear questionable on this count are Swisher and C. Walker who filed incomplete Brown & Root applications. They, however, applied November 22 and 23, 1989, by which time, as they surely knew, the Employer was firmly established in its determination not to hire any applicants who declared on their application they were a ''Boilermaker Local 667 Volunteer Union Orgaizer'' or words to that effect.) The prima facie qualifications are apparent below.

Where a given application date is one established only testimonially, that date is shown in parenthesis in the summary provided below. Where years of experience, though not in application is revealed in testimony of an applicant, that determined fact is also shown in parenthesis. Where it ap-

pears *clear* of record that an applicant was interviewed only by the Job Service that is shown by J.S. Otherwise it is deemed more indicated the interview was conducted by Johnson, and that fact is then shown affirmatively under interview column as a ''Yes.'' Few applicants have corroborated Thomas, that they obtained a copy of their job application and had returned it to the Union on his instruction. Rather, it is clear that they did so far more often as a result of McCormick's (or Bush's) direct (or indirect) instruction, but all of whom (I credit) then turned their obtained copy in to the Union (as now appear in G.C. Exh. 7 series). The (few) others who did not get a copy were recorded in due course (whether by their own signature, Thomas listing, or union agent listing), as reporting that they had turned an application in for employment with Brown & Root (G.C. Exhs. 6a–b), as Thomas finally described.

Excluding Southall, it is apparent from General Counsel's Exhibits 2 and 7 series (in the comparisons as set forth below), and from mutually consistent testimony of almost all individual applicants (46 of 48) when called to testify thereon (in minor part) by the General Counsel, and principally by Respondent Employer, that each have testified as subpoenaed adverse witnesses, that they individually had filled out a Brown & Root field employment application at the Job Service center, except as shown for Skeens (G.C. Exh. 7FF) who filled out only the WVA Employment Service Application Form, though even that form had written on its face that it was an application for Brown & Root employment, and it bore Skeens declaration (also) that he was a ''Boilermaker Local 667 volunteer organizer.''

Michael P. Haught and Andrew R. Lowther provided the Union with copies they (apparently) obtained of *both* applications they filled out for the Job Service and Brown & Root (G.C. Exhs. 7P and U, respectively). The Job Service form filled out by Haught (G.C. Exh. 7P) contained Haught declaration of being a ''Boilermaker Local 667 Volunter Organizer, but apparently not that of Lowther (G.C. Exh. 7U). No Job Service employment request forms are shown to have been viewed by Johnson, and he denied that he reviewed them. The Brown & Root applications of both Haught and Lowther (G.C. Exhs. 2(r) and (x)), however, were, and each contained the same volunteer language. Indeed, Johnson confirmed in general that he had interviewed most of the above-named applicants, Employer questioning receipt (of applications) only from the four named and determined above.

Johnson has further testified that even after he had moved into a new Dunbar office of Brown & Root (February 1990) he had left blank Brown & Root applications with the Job Service, for their continued use in having qualified applicants fill out Brown & Root applications, which were kept on file there. Indeed, Johnson effectively kept the Job Service supplied with Brown & Root application forms well into 1990.

Johnson has explicitly confirmed arrangements he had with the Job Service was (even after February 1990) that Job Service personnel were still able to check (screen) Job Service (registered) applicants for work with Brown & Root, even though Johnson had moved into Employer's new office established for him in Dunbar, West Virginia. Indeed, Johnson was concededly aware WVA Job Service personnel were not only still accepting applications, but that they were also talking to applicants, though Johnson asserts that he did not know what happened after that. Johnson has testified explicitly that only he could interview applicants on Brown & Root's behalf. Johnson testified that the Job Service made the decision whether Brown & Root would get all applications submitted to the Job Service or only get selected applications, and that was a condition that they insisted upon. The record, however, is also clear that it was Brown & Root that kept the Job Service supplied with Brown & Root applications to be filled out, and Johnson also acknowledged that he knew where the files of such were kept, and he guesses he could have had access to them.

In my view it follows that Brown & Root made the Job Service its agent for the purpose of initial process of Brown & Root applications, and it cannot now avoid the reasonable foreseeable consequences of its actions in providing Job Service with Brown & Root application forms for registered applicants to fill out, for Job Service to process to Brown & Root. Compare, e.g., Swisher's case, where a Swisher Brown & Root application was filed with the Job Service (not apparently a Job Service registration), and apparently not referred to Brown & Root. (See the related discussion of applications of Swisher and three others (screened), whose applications Employer claims were not received by Johnson, but are not questioned by Employer to have been received by Job Service.)

All the applicants in question filed individual applications in accordance with procedure Brown & Root had established for the securement of employment, with it, and the applicants did so with union declarations, singularly and in various concert (at different times, dates, and different size groups), and most 46 also did so timely between September 19–25, 1989. And all but one individual effectively put voluntary union organizer on their application or words to that effect, and even that one was treated by Employer the same as were the rest of the declared volunteer organizer group.

The record does reveal that under the same established procedures with Job Service, Johnson received between 550 and 700 applications, all of whom Johnson has personally interviewed. But Johnson interviewed them during a much longer period, thus between September 1989 and February 1990. Numbers on file and interviewed in the more material times (September 25 or October 18, 1989) are not shown. Similarly, in a count made of Brown & Root applications on file with Job Service in April 1990, Johnson has testified he personally counted well over a thousand Brown & Root applications that were then on file with the Job Service. Neither Employer recount adequately addresses the fact that by far the bulk 46 of material 48 Boilermakers applications were received very early for Employer's emploment consideration, between September 19–25, 1989.

Thus, Employer does not show how many were received in either pertinent material time, e.g., September 19–25, 1989, or as Employer contends is alone material on 10(b) urged basis, by October 18, 1989. In contrast with that time it is established that 46 of the named 48 Boilermakers applicants were filed, and (at least) 44 conceded received by Johnson essentially in the first week Brown & Root was on the job, with interviews starting if technically not the very first day that Brown & Root mobilized the job with a few employees brought in (September 18), then with filings starting on the next day, September 19, 1989, and with 46 (of initial 48) applying before Brown & Root had even first started hiring locally for the job. (Employer acceded its pos-

session of 44, the 43 applications in G.C. Exh. 2 series and Cronin.) Johnson testified that once Job Service referred an application to Johnson, he had possession of it.

9. Summary of findings on Boilermakers Local 667 applicants and their applications

	Name	*Date Applied*	*Interview*	*Work Preference*				*Last Rate*	*Date Said Available*
				First	*Yrs.*	*Second*	*Yrs.*		
1.	Asbury, Joe E.	9–20–89	Yes	Pipewelder (Var. weld 5–9)	10	Rigging	13	17.01	9–20–89
2.	Barker, Herbert	9–25–89	Yes	Boilermaker (19 years' experience)		Pipefitter		17.01	9–25–89
3.	Blue, Deborah M.	9–22–89	Yes	Pipewelder	13	Welder	13	17.01	9–22–89
4.	Butcher, Michael	9–20–89	Yes	Pipewelder (heli-arc)	13	Mechanic	13	17.01	11–21–89
5.	Carpenter, Stephen C.	9–21–89	Yes	Pipewelder (fully qualified)		Pipefitter		17.01	Immediately
6.	Cashdollar, Richard J.	9–20–89	Yes	Pipefitting	12	Welding	12	17.01	Anytime
7.	Combs, William	9–20–89	Yes	Pipewelder		Pipefitter		17.01	(Looking for work)
8.	Cox, Paul R.	9–20–89	Yes	Pipewelder		Pipefitter		17.01	10–1–89
9.	Cronin, Jeffrey	9–21–89	Yes	Welder (10 years' experience)		Rigger		17.01	9–22–89
10.	Dew, Steve L.	9–25–89	Yes	Mechanic	13	Rigger	13	17.01	Immedately
11.	Dougherty, Dan	9–25–89	Yes	Pipewelder	5	Rigger	6	17.01	9–26–89
12.	Elliot, Ronald	9–21–89	Yes	Welder	15	Mec.	15	17.01	9–21–89
13.	Fisher, Charles	9–21–89	J.S.	Welder	15	Layout work	15	17.01	9–21–89
14.	Fleck, Harvey A. (Did not testify.)	9–25–89		Welder	20	Pipefitter		17.01	Anytime
15.	Frye, Paul D.	9–19–89	Yes	Welder	13	Fitter	13	17.01	9–21–89
16.	Gerlach, James	9–21–89	Yes	Boilermaker (17 years' experience)		Pipefitter		17.01	9–21–89
17.	Griffith, Roger	9–21–89	Yes	Welder	12	Rigger-Burner	12	17.01	Now
18.	Hale, Rodney L.	9–21–89	J.S.	Boilermaker	20	Welder	20	17.01	Immediately
19.	Haught, Michael	9–25–89	Yes	Pipefitter	12	Foreman	.5	17.01	9–25–89
20.	Hudson Sr., J.	9–21–89	Yes	Welder	25	Layout	5	17.01	9–21–89
21.	Jeffers, Ira R.	9–21–89	Yes	Pipewelder	16			17.01	Now
22.	Johnson, Larry	9–19–89	Yes	Rigger		Burner		17.01	10–1–89
23.	Kelley, Kenneth	9–20–89	Yes	Pipefitter (20 years' experience)		Pipewelder		18.26	9–21–89
24.	Lamp, Rodney M.	9–21–89	Yes	Welder	15			17.01	9–21–89
25.	Lowther, Andrew	9–25–89	Yes	Supervision	3	Pipefitter	12	17.01	9–25–89
26.	Marion, Roger L.	9–21–89	Yes	Welder	10	Mechanic	13	17.01	Present
27.	Martin, Kenneth	9–21–89	Yes	Pipewelder	16	Burning	16	17.01	Now
28.	Moore, Tamara	9–22–89	Yes	Pipewelder (Journeyperson)	13	Welder	13	17.01	9–21–89
29.	Morris, Raymond	9–25–89	Yes	Pipewelder (26 years' experience)				17.01	
30.	Mosteller, Donald	9–21–89	Yes	Pipewelder		Pipefitter		17.01	(Needed the job)
31.	Mosteller, Earl Wayne	9–20–89	Yes	Pipefitter	20	Welder	20	17.01	Now
32.	Mosteller, Gilmer (Did not testify)	9–19–89	Yes	Rig(g)er	38	Fit-up	38		Now
33.	Oldfield, Tim W.	9–21–89	Yes	Welder	14				Anytime
34.	Pierson, Randall	9–21–89	Yes	Welder	4	Pipefitter	4	11.90	9–21–89
35.	Pinkerman, George	9–20–89	Yes	Pipefitter	19	Welder	15	17.01	Now
36.	Prowse, Ralph A.	9–21–89	Yes	Welder	17	Rigger (Fitter)	17	17.01	Anytime
37.	*Skeens, James R.*	(9–21–89) WVA Form	J.S.	(Boilermaker)				17.01	Short/Min. Perm job
38.	Smith, Raymond	9–21–89	Yes	Welder	10			18.14	Now

	Name	Date Applied	Interview	Work Preference				Last Rate	Date Said Available
				First	Yrs.	Second	Yrs.		
39.	Ralph Southall	4–17–90	(See part III)						
40.	Sprouse, David L.	9–20–89	Yes	Welding (15 years' experience)		Rigging		17.01	9–20–89
41.	*Swisher, Gary*	11–22–89	No	Welder	22				
42.	Templeton, Lowell	9–20–89	Yes	Welding	26	Fitting & Rigging	26	17.01	Anytime
43.	Thomas, Bill Allegation W/D	9–19–89	Yes	PipeWelder		Boilermaker		17.01	9–20–89
44.	*Walker, Carl A.*	11–23–89	No	Boilermaker	13				
45.	Walker, Garrett	9–19–89	Yes	Welder (Boilermaker 22)				17.01	Now
46.	Wallis, Jerry A.	9–20–89	Yes	Pipewelder or Fitter (at least)	10			17.01	Anytime
47.	Wallis, Robert D.	9–20–89	Yes	Pipewelder (14 years' experience)		Pipefitter		17.01	2 days' notice
48.	Webb, Paul E.	9–19–89	Yes	Welder (3000 hrs. permit-Journeyman 12/89)		Mechanic		17.01	9–19–89
49.	*Wise, Michael*	(9–21–89)	J.S.	(Welders Mech, Helper, Laborer)					(Unemployed Would take)

a. *Employer's congruous summary concessions*

Employer in brief has allowed that of the alleged discriminatees in this case, 6 had applied on September 19, 12 applied on September 20 (confirming Templeton's date), 17 applied on September 21, 2 applied on September 22, and 7 on September 25. Employer's summary of dates of applications, as far as it goes, is wholly compatible with the above.

b. *Boilermakers Local 667 member-organizer status established*

The record in its entirety shows all the above individuals are members of Boilermakers Local 667, except Wise, who although a member of another Boilermakers local, Local 45 in Richmond, Virginia, personally lived in the Charleston area, and had already cleared (with McCormick and Bush) transfer of his union membership into Local 667, on that employment condition (and Ralph Southall, who is a member of a Pipefitters local union of a different International Union).

In summary review of applications submitted, I find that all but (at best) two are shown to have contained the legend *Boilermakers Local (#)667 volunteer (union) organizer* or words to that affect. Thus, 34 of the above 48 applicants have explicitly stated on their individual applications they were a Boilermakers Local (#)667 volunteer (union) organizer, and 10 more (reversely, but in the same substance and effect) said they were a volunteer, or a voluntary (union) organizer (for) Boilermakers Local (L.U., L) and/or #677. Of the remaining four applicants, two (Gerlack and Hale) had otherwise openly declared themselves as Boilermakers Local 667 organizers, though Gerlack did not mention volunteering as such, and Hale had identified himself as a temporary (rather than volunteer) organizer.

Though it does appear that applicant Morris made no statement of intended organizing on behalf of Boilermakers Local 667 on his application, it is no less apparent therefrom Morris did record that he was last paid the (established) Boilermakers' rate of $17.01 on the occasion of last working for an established union contractor, concerning both of which circumstances Johnson was admittedly well aware. In the end, only the application of Wise is not corroboratively in evidence, though (I find) Wise has testified credibly that he put it on his application.

10. Company knowledge of named applicants as Boilermakers Local 667 volunteer union organizers; the basis of Pribyl's first decision

As Respondent's witness, Pribyl, testified that he first learned there were a series, elsewhere described as a ''batch'' of applications from applicants on which the words ''union organizer,'' ''voluntary union organizer,'' Boilermakers union organizer, or words to that effect were listed, when Johnson called him in late September 1989. Johnson reported to him that there were similarities in the forms, and Johnson said he felt they had been sent by the Unions in order to set us up, with Pribyl adding, ''And I think that was obvious.''

Pribyl estimated this conversation with Johnson took place within a couple of days from the time work had started on the project, or sometime during the period September 18 to 21, 1989. But Johnson testified more definitively (and more plausibly), ''I believe it was during the day of the—the first day that I received them.'' Accordingly, I find Johnson had called Pribyl on September 19, 1989, which was the first day that Johnson started receiving the applications for employment that identified an applicant (essentially) as Boilermakers Local 667 volunteer organizer, as found more definitively below. Pribyl initially told Johnson not to do anything with the applications that had words volunteer Boilermakers organizers written on them, but to put them in the folders with the rest of the applications, and bring them to the site the next time that Johnson came out and *Pribyl would review them.*

Johnson corroborated that he had promptly informed Pribyl about receiving the volunteer union organizer applications. Johnson recalled, however, that *they initially went over the applications themselves over the phone, Johnson talked*

with Pribyl about the interviews, including that (after interview) they were all requesting a copy of their applications, and Johnson said that he ''thought they were trying to set us up for a lawsuit'' or for ''some legal action.'' Johnson asked Pribyl what to do about them. Johnson confirms that Pribyl then first told Johnson to keep all the applications on file until he got back with Johnson, and that he would tell Johnson what to do with them.

Pribyl recalled when Johnson first described the batch of applications that had ''voluntary union organizer'' (or words to that effect) listed on them Johnson had also told Pribyl that the applicants had come in large groups and it appeared to him they had been instructed to come down; and, there were similarities on the applications, a lot of them put the same references down; and they wrote ''voluntary organizers'' on them. According to Pribyl, Johnson ''was concerned that we would probably be faced with unfair hiring practices. And we were trying to be [sic, in context being] set up.''

Johnson could not recall his exact words when he told Pribyl that he felt that they were being set up. Johnson could not recall whether he specifically mentioned to Pribyl that he thought they were being set up for an EEO action, an NLRB action, or an unfair labor practice action. He affirmed, however, that it was possible he referenced a specific type of lawsuit or charges. Pribyl later clarified, ''I think what Tom probably said was that we would be faced with NLRB charges.'' I find that to be by far the more likely.

Johnson testified that on the occasion of the first time he told Pribyl they had received a group of applications with ''voluntary union organizer'' on them, he did not recall whether or not he told him that all the applications were from members of the Boilermakers Union (Tr. 5058). After further consideration, however, Johnson testified that he, himself, knew the group of applications had come in from members of the Boilermakers Union, and he felt he probably had told Pribyl this during their first conversation, though he remained not sure.

Pribyl recalled it was a couple of days after that (first) conversation, Johnson brought the applications to the jobsite and showed them to Pribyl. Pribyl reviewed them, and then he told Johnson (again) to leave (all) the applications (he then had) in the folder and Pribyl would get back with him. Pribyl's recollection was that within 4–5 days, or a week, he did get back to Johnson. Pribyl testified, however, that before he gave a response to Johnson as to what to do with the applications, Pribyl called his immediate supervisor, Frank Yancey, at Yancey's office in Houston.

There is some confusion, if not conflict, in Pribyl's recollection as to the chronology of these calls. When shown a calendar, Pribyl recounted of the time of his first conversation with Johnson, severally, they mobilized the job on September 18, a Monday, and he was sure it was not September 19, it was either September 20 or 21, a Wednesday or Thursday, as he recalled it (that Johnson called); and, that Johnson brought the applications to Pribyl on that Friday, September 22. Pribyl tried to reach Yancey that day, but he was out of town. He did reach Yancey on Monday, September 25, 1989.

Pribyl told Yancey of his concerns. Pribyl told Yancey, ''[W]hat had happened with the applications, the way they had been received and what was written on them,'' and Pribyl told Yancey, ''I was not going to consider them to be hired for the project.'' Pribyl told Yancey how many applications they had received, what had been written on them, but they did not mention names. (Indeed, on other occasion Pribyl revealed at the time of his conversation with Yancey, Pribyl did not know the names of the applicants.) Pribyl relates that Yancey agreed with Pribyl's concerns, and ''[w]e talked a little bit about probably having charges filed against us, but I held my ground. Frank agreed with me that we should not hire any of them. So, I called Tom back and told him that we would not consider any of them for hire.''

In that regard, so the General Counsel has observed, it appears from Pribyl's testimony that Yancey wanted to consider the applications for hire because Pribyl testified, ''We talked about probably having charges filed against us, but I held my ground. Frank agreed with me that we should not hire any of them.'' The Union, however, has stressed on that point that Yancey had agreed with Pribyl's position, and Yancey had (effectively) told Pribyl not to consider the voluntary union organizer applications for hire. I agree that Yancey gave his approval of Pribyl's decision, and I so find.

Pribyl also testified that at the time it was obvious to him that these applicants were troublemakers (Tr. 4980). Pribyl related his use of the word ''troublemakers'' in reference to those who had submitted applications with the words ''voluntary organizer'' on them, had first occurred in his conversation with Johnson (Tr. 4915), though he probably did state it also later to Yancey (Tr. 4916). In any event, Pribyl acknowledged that he said he was not going to hire any of the applicants who had said they were voluntary union organizers and that Yancey agreed with him.

Pribyl clarified, he brought up with Yancey, the subject of charges being filed, and he was fairly sure he referred to NLRB charges. Pribyl relates:

> I told Frank (Yancey) that I was not going to hire any [sic, of] these individuals, but because of that we, very possibly, could be faced with NLRB charges further down the road. Frank said you are probably right, but I agree with you. We are not going to put to risk of [sic] our employees or the plaint [sic] workers or the community. We did not go into a great lengthy conversation of what the charges might be or when it might happen or anything of that nature. We just—I think we both realized it [Tr. 4920].

On later occasion, Pribyl said, he felt they should not be hired because of the events that were going on around him. Pribyl identified the following factors: alleged sabotage on the job; the picketing; and the ''apparent attitude that the picketers and protesters had concerning law enforcement.''

On the first point Pribyl has testified there were acts of vandalism and sabotage from the first day they started (Tr. 4884). Pribyl gave an example of safety barricades made out of wood being torn down during the night and destroyed. Pribyl testified within the first 2 to 3 days that they started work at the site, they came in one morning and found that wooden barricades, which they had placed around pieces of construction equipment, had been torn down (Tr. 4895). Pribyl estimated that happened at least twice a week, for several months, that they came in and found the barricades torn down (Tr. 4897). Scaffolds that had been built would be adjusted. Wires had been cut where scaffold boards were no

longer tied on, and handrails had been unbolted, purposely modified, so they were no longer safe to work off of.

Pribyl recalled that a cherry picker had a gas tank partly filled with water (Tr. 4884). Pribyl was unsure of the date of the cherry picker incident, but believed it was sometime within 2 weeks of September 18, 1989 (Tr. 4930). Pribyl had no first person knowledge of who had allegedly put water in the fuel tank of the cherry picker (Tr. 4928). No person was ever identified as the culprit who had put water in the fuel tank of the cherry picker (Tr. 4929). No one was ever arrested for the cherry picker incident (Tr. 4929).

Pribyl recalled there were other incidents of concrete being defaced, and they had welding machines that had peices of rebar stuck through radiators. Pribyl cited about four different occasions when Brown & Root had to repair concrete when somebody had taken something like a piece of rebar (steel) and written obscenities in the concrete, and other objects put in the concrete that had been poured. On one occasion, the words ''F— B & R'' was etched into the concrete and, in another incident, the concrete said, ''Brown'' and underneath a male genital was etched in. On cross-examination, Pribyl clarified the first incident where someone allegedly etched something in concrete to deface the concrete that had been freshly poured occurred around 3 weeks after the start of work, or mid-October 1989, well after he had made the decision on September 25, 1989, not to hire any of the named boilermakers applicants (Tr. 4921).

Pribyl related there were slogans painted in smoke pens, within 2 or 3 days of the time they came on the job. But he readily clarified that this was apparently being done by plant workers (Tr. 4898). (Smoke pens are areas where employees are allowed to smoke cigarettes.) The slogans were *''Brown and Root go home,''* or obscenities concerning Brown & Root. They were painted with spray paint on the inside wood walls of smoke pens. Pribyl has recalled six different occasions when they had to repaint the smoke pens. None of the named 48 applicants were ever on Brown & Root's (job) premises, let alone on there in the months of September and October when most of the above sabotage that Pribyl reports occurred on premises.

Moreover, Pribyl admitted on cross-examination that at that same point in time that he had no idea or evidence as to identity of the individuals or those individuals who may have been committing alleged acts of sabotage (Tr. 4918). Thus, Pribyl had no specific knowledge as to identity of any individual or individuals who may have committed any acts of sabotage such as destroying the wooden barricades. Pribyl went on to admit on cross-examination he had never determined the identity of any of the individuals who committed acts of sabotage. Pribyl also acknowledged that no individuals were ever arrested for any acts of sabotage inside the plant. Pribyl recalled, however, a temporary restraining order (TRO) was obtained mid-October.

The General Counsel argues, it follows logically from Pribyl's testimony, that Pribyl had to admit, as he did not know the identity of those who had committed sabotage, he did not know whether or not any of the named applicants in the batch of applications he had was responsible for any sabotage. In the end, Pribyl acceded he was not attributing any act of sabotage that may have occurred as of that time to the Boilermakers Union (Tr. 4937). I so find.

Pribyl testified that he based his decision not to hire them (the declared Boilermakers volunteer organizers) on the fact that he personally witnessed picketing at the gate when he came into work, typically pickets blocking the entrance a lot of verbal abuse. ''There was a lot of shouting, calling us scabs and rats and we know where you live and we will get you. Those type of things. Picket signs telling Brown & Root to go home. Eventually it got worse, they started beating on cars and throwing things, cheese, spitting tobacco, throwing rock, and putting nails up in the entrance, it got worse'' (Tr. 4883).

Again, however, Pribyl admitted at hearing that at this point in time, he had no personal or specific knowledge that any of the (Boilermakers Local 667) applicants who had submitted their applications with the words voluntary organizer on them were on the picket line (Tr. 4917). Pribyl further admitted he had no specific knowledge any of those people who had submitted applications in question and were named in the instant NLRB complaint as discriminatees, were then engaged in any of the unlawful violent incidents occuring on the picket line (Tr. 4917).

Pribyl further admitted that as of September 25, when he made his decision not to hire the applicants, he had no evidence any official of the Boilermakers Union had been arrested for unlawful conduct on the picket line. Pribyl was not aware at the time he made his decision, as to anyone who had been arrested. Indeed, Pribyl explicitly acknowledged that any arrests that were made at the gate where the picket line was, were made sometime after his decision not to hire any of the batch applicants. Pribyl then reaffirmed this (decision not to hire) was made around September 18 to 21 (Tr. 4919). No arrests were made (at best) before October 9, 1989 (see below). Pribyl has acknowledged that by the time of a TRO (below) he had long already made the decision not to hire any of the applicants who had written ''voluntary organizer'' on their applications.

Pribyl otherwise asserted that he did not want to hire those who placed ''voluntary organizer'' on their application because he did not consider them legitimate applications. Pribyl explained there was picketing going on at the gate, and he felt the union officials were instructing the pickets what to do. (Tr. 4881.) Pribyl stated that at the time he made the decision, he was attributing certain conduct to the Boilermakers Union, which he has defined as being ''all of the illegal activities and the irresponsible type of activities that were happening at the gate.'' Pribyl identified the (improper) activities happening at the gate as ''the pounding on vehicles, personal property damage, threats and intimidation. Everything that was happening to my employees. The people at the gate apparently had no concern for laws or safety.'' (Tr. 4917.)

As to the specific picket line activity Pribyl witnessed, he testified on direct that he heard pickets shouting, *''We know where you live''* and *''Brown & Root go home''* as well as other items. Upon cross-examination, Pribyl admitted he did not know the identity of any of the pickets who had shouted at him (Tr. 4927).

On an occasion when his car was blocked, he heard pickets shouting, we know where you live, Brown & Root go home. On other occasions he heard such things shouted as scabs, rats, Brown & Root go home, get out of West Virginia, do not take our jobs. Indeed, Pribyl was never able to identify any picket who shouted anything, asserting that this

is because he is from out of the State and that he does not know anyone in West Virginia. All that Pribyl knew was he had heard the statements (Tr. 4927–4928).

Pribyl at one point claimed he based his opinion that he should not hire applicants who placed ''voluntary organizer'' on their applications on the fact that the picketers were breaking the law (Tr. 4941). He clarified that he meant picketers in general, and he also admitted he did not know the names of any of the picketers who were allegedly breaking the law on September 25 (Tr. 4942).

Pribyl was not aware of any Boilermakers official who had engaged in any unlawful conduct as of September 25, 1989. In contrast, Pribyl admitted he was aware there were representatives of other unions on the picket line, besides the Boilermakers Union (Tr. 4939). For instance, there were other members of the Charleston Building Trades on the picket line, including Carpenters and IBEW members (Tr. 4940). The reason that he tied the applicants to the Unions were because of the activities at the gate. And the reason that he would not consider the applicants was because of violent and irresponsible activities, breaking the law, and the safety concerns that he had of bringing those type of people inside the plant (Tr. 4941). As to why Pribyl (personally) connected the Boilermakers voluntary organizer applications with the picket line, the only explanation that Pribyl came up with on direct examination was that ''on several occasions there were picketers out at the gate that were wearing Boilermaker jackets and ball caps'' (Tr. 4903).

Pribyl stated that he did not want to bring the *troublemakers* inside the plant that they were working in (Tr. 4882). Pribyl was afraid if he brought them into the plant, ''something (might) happen inside the plant that would cause either a unit to be shut down or worse or some sort of wild event'' (Tr. 4882). Pribyl affirmed when he (and Yancy) had discussed the matter and Pribyl had made this decision (with Yancy's full awareness and approval), Pribyl had no evidence at all of any of the applications by name having engaged in any of the wrongful conduct (Tr. 4935).

The following inquiry then ensued (Tr. 4935–4937):

> JUDGE ROMANO: What was it that the company was making a policy decision not to do?
>
> THE WITNESS: I am not sure that it was a policy decision. It was my decision as project manager to supply the type of workers that I felt would perform in a safe and efficient manner. And I did not feel like that the people putting in applications wanted to work for us for the of [sic] earning a living. They wanted to, if hired organize the same type of activities that was happening at the gate inside the plaint [sic] to get us kicked out.
>
> JUDGE ROMANO: I am going to ask it as [sic] different way.
>
> THE WITNESS: Okay.
>
> JUDGE ROMANO: Because I want you [sic, your] answer. Was the company making it—were you making a decision on the basis of an institution such as the Boilermaker Union as opposed to those who had made applicants [sic]?
>
> THE WITNESS: I tied the applicants to the Boilermaker Union. They wrote either voluntary Boilermaker organizer or Union organizer. They wrote—I guess on previous job histories that they were working for a Union boiler who I knew—something about the company. They give references—a lot of them not all of them—give references as Bill Thomas the Boilermaker organizer chairman or what ever he is. I tied the applicants to the Boilermaker Union, yes, sir.
>
> JUDGE ROMANO: What conduct as of that time were you attributing to the Boilermaker Union?
>
> THE WITNESS: All of the illegal activities and the irresponsible type of activities that were happening the gate.
>
> JUDGE ROMANO: Through September 21st?
>
> THE WITNESS: Sure.
>
> (Pause)
>
> JUDGE ROMANO: Were you or were you not attributing any of—any act of sabotage that my [sic, may] have occurred as of that time to the Boilermaker?
>
> THE WITNESS: Not to the Boilermakers, no, sir.

Moreover, Pribyl admitted that at the time that he talked to Yancey about what should be done with applicants who had written ''voluntary union organizer'' on their applications, he at that time had no evidence at all that any of the 48 named Boilermakers Local 667 applicants had engaged in any wrongful conduct (Tr. 4935). But he perceived them as troublemakers, as is evidenced by his earlier conclusion expressed in first conversation with Johnson, without any such information, ''I think it was obvious to me that they were troublemakers'' (Tr. 4880).

Pribyl confirmed it was at this point (after his conversation with Yancy) that he called Johnson and told Johnson he was not going to consider (for emplomentt) any of the applicants who had written ''union organizer'' or ''voluntary union organizer'' on their applications (Tr. 4879–4880). Pribyl called Johnson on or about September 25, 1989 (Tr. 4934), and Pribyl at that time told Johnson not to consider the ''voluntary union organizer'' applications for hire (Tr. 4934 and 5006). None of the above named 48 Boilermakers Local 667 members were hired, or have been, *ever*.

There is some evidentiary confusion as to when Pribyl made his first decision. Pribyl first estimated generally that it was within 4 or 5 days he phoned Johnson and told Johnson he was not going to consider any of the applicants who had written ''union organizer'' on their applications for hiring at the Rhone-Poulenc jobsite (Tr. 4879). Pribyl later recalled that it was (earlier) around September 18 to 21 that he had made the phone calls to Johnson and Yancey and subsequently determined that none of the applications bearing ''voluntary organizer'' on them should be processed (Tr. 4917). Later in his testimony, however, after being provided with a calendar for the year 1989, Pribyl then estimated that the date he told Johnson not to hire the applicants was September 25, 1989 (Tr. 4934).

Johnson confirmed applications from the applicants who placed ''voluntary organizer'' on their applications came in on September 19, 20, and 21, 1989, though he believed he also got some of these applications on September 25, 1989 (Tr. 5005). Johnson recalled he talked to Pribyl on the *first* day he received the applications (which I find is both more plausible and likely, and thus I find) on September 19. Johnson, however, has estimated he probably would have taken the applications out to show Pribyl on that following Thurs-

day or Friday, September 21 or 22, 1989. (Johnson's omission of September 22, as a day on which he received applications, would tend to support his presence at the jobsite that day as Pribyl recalled, and Johnson testimony alternatively allows, and which I find more likely.

Johnson has also confirmed generally Pribyl soon got back to him with his answer on what Johnson should do with the applications sometime during the week of September 25, 1989, though Johnson was not sure exactly what day (Tr. 5005). Given Pribyl's recollection of not being able to reach Yancey, and the basic compatibility of Johnson recollection, on weight of the evidence that is deemed the more credible I conclude and find that Pribyl more likely obtained Yancey's review and approval of Pribyl's formalized decision not to employ any of the 48 (actually then 46) applicants who said they were ''Volunteer Union Organizers'' on their applications, and told Johnson that on September 25, 1989, promptly after review with Yancey on that Monday.

Accordingly, I conclude and find that it was (at the latest) on September 25, 1989, that Pribyl had decided, reported on, and received Yancey's approval, and then directed Personnel Manager Tom Johnson not to consider for hire any of the applicants who had placed Boilermakers voluntary union organizer, or words to that effect, on their applications. And none were considered for employment thereafter, *ever*.

Johnson confirmed once Pribyl told him *not* to process the applications any further, he did not consider them for employment. Johnson corroborated Pribyl that Pribyl did not give him a reason why Pribyl had decided not to consider the people who had submitted ''voluntary organizer'' applications for employment (Tr. 5060), and Johnson considered the instruction from Pribyl not to consider the group of applications that had ''voluntary union organizer'' on them was out of the ordinary (Tr. 5061). Johnson had testified earlier, that when Pribyl told Johnson not to consider any applications that he had gotten that had words to the effect voluntary union organizer on them, Johnson told Pribyl, ''I thought it was possible that we might get some unfair labor charges and that he might want to check with the people in Houston.'' Johnson believed that Pribyl said he already had (Tr. 5006). Johnson later reaffirmed that Pribyl told him that Pribyl had checked with Houston (headquarters) on this. Johnson affirms Pribyl did not then say, ''And they agree with me,'' or, ''They're opposed to my decision,'' Pribyl just said, ''I've checked with Houston,'' period (Tr. 5062).

Pribyl testified these applications (with Local 667 voluntary organizers on them) were the only applications he told Johnson not to consider for hire; and, Pribyl testified anyone who had not written ''union organizer'' on their application would have been considered for hire if they were qualified.

The General Counsel and Charging Party Boilermakers International would also have observed that Johnson admitted when he interviewed applications he had told them that he would give their application every consideration (or words to that effect) (Tr. 5079). After Johnson was informed by Pribyl not to consider any applicants who had placed ''voluntary union organizer'' on their applications, Johnson made no attempt to contact them in any way to tell them that because they had put ''voluntary union organizer'' on their application, they would not be hired.

11. The Company's change of position

Pribyl testified that around mid-June 1990, he changed his decision about not accepting applications which had ''voluntary organizer'' on them. He relates that he was talking on the phone to Johnson, and Johnson had asked him if he got additional applications with voluntary organizer on them, what should he do. Pribyl told Johnson at that time that he did not see any reason why they could not hire somebody from then on. The reason advanced by Pribyl for this asserted change in policy was the picketing activity had ceased as of June 1990. And by then, sabotage and vandalism had stopped happening inside the gate (Tr. 4904).

Pribyl testified that Brown & Root does not now have a policy of refusing to hire or refusing to consider for hire individuals engaged in lawful picket line activity (Tr. 4923). Indeed, according to Pribyl, Brown & Root never had such a policy. Pribyl has also related Brown & Root does not now have a policy against hiring or considering for hire any individuals who engage in lawful peaceful protest (Tr. 4924). Nor does Brown & Root have a policy of refusing to hire individuals who engage in lawful political protest, such as rallies to try and influence legislation (Tr. 4924).

The parties also stipulated that after mid-June 1990, Brown & Root has considered for employment and has offered positions to applicants who wrote voluntary union organizer, or words to that effect, on their application, excepting those (48 boilermakers) named here. It is established of record no self-declared and company known Boilermakers Local 667 volunteer union organizer named in the complaint has ever been hired by Brown & Root.

12. The union-employer dispute over a claimed de facto disproportion in hiring

Between mid-September 1989 (when Brown & Root began accepting applications for the Rhone-Poulenc project) and June 1, 1990, Brown & Root hired 212 employees at Rhone-Poulenc, of which Respondent Brown & Root has conceded that 183 of these employees had no union background whatsoever. Of the other 29 employees hired, each of their applications (R. Exhs. 195–222 and C.P. Exh. 2) revealed some evidence of union background. The Union contended they also evidence a more recent *nonunion* background. The Union argues since Johnson admitted he is capable of ascertaining from an application whether the companies that an applicant has worked for in the past are union or nonunion (Tr. 4978), Brown & Root has effectively hired no applicants that the Company had perceived would constitute a threat to its nonunion philosophy, *KRI Constructors*, 290 NLRB 802 (1988).

In reply brief (app. 1) in addition to claim there is no evidence of antiunion animus, Employer asserts that the Charging Party argues, contrary to the facts, that Brown & Root refused to hire anyone whose application indicated that they had a union background or a recent union background. Employer has readily conceded that this assertion, if it were true, would be critical to an element of antiunion animus that the General Counsel must establish in order to prove an 8(a)(3) violation. The Employer, however, would have it observed that 29 of those hired did have some indicia of a union background. Thus, Employer contends that fully 14 percent of Brown & Root's hires (29 divided by 212) during

the first 9 months of the Company's project had a union background. Employer cross-argues the obvious inference from this stipulation is that Brown & Root's hiring policies had no antiunion animus.

Employer asserts Charging Party's claim that each of the 29 applications reveals a ''more recent'' nonunion background is false. Employer contends the evidence of record shows that of the 29 employees with union backgrounds, 14 (or 48 percent) have indicated on their applications that they had recent experience with union employers, contrary to the Charging Party's assertions.

Employer shows Charging Party Union has admitted union experience of three such employees: Barry Rader (Tr. 5086 and 5102–5103; R. Exh. 201(a)), Michael Murphy (Tr. 5089 and 5106; R. Exh. 210(a)), and Douglas Fisher (Tr. 5089–5090; R. Exh. 211(a)). (I note, however, that Fisher's application is dated January 10, 1990; that Fisher was a backhoe operator last employed by C. J. Hughes Construction Co. (Hughes) whose employees including Fisher and five others (below) were on strike; and Fisher had listed his reason for leaving Hughes in January 1990 as simply ''strike.'') Employer would correctly add Thomas Collier, an ironworker with ''Local 7'' who was employed for 2 years immediately prior to application. (Though the Union has elicited a Johnson acknowledgment, Collier had only 2 years of construction service with, or through, that Union, and reaffirmance that the Employer's journeyman requirement as given to Job Service was 4 years' experience (Tr. 5083–5084 and 5101; R. Exh. 197(a)), the issue under consideration is whether there was indication of union status (whether construction, craft, or industrial), and not (presently) whether there was incidence shown of disparate journeyman norm use.)

The record reveals 11 others had had immediate, or essentially immediate, prior union employment, though not necessarily with construction unions. Brian Dearien was employed as a package car driver for United Parcel Service for the 3 years immediately prior to his application, and he was (last) paid $11.01/hour (Tr. 5101; R. Exh. 198(a)); Clarence Jarrett was employed as a cable splicer by C & P Telephone Co. for 11 years immediately prior to his application, and he was (last) paid $16.50/hour (until he was laid off in March 1989) (Tr. 5102; R. Exh. 199(a)); Thomas Fox was employed as a mechanic for 13 years with VW of America and (last) paid at $15.35/hour (until June 1987 when he (his employer's operation) ''closed'') (Tr. 5290 and 5103; R. Exh. 203(a)). On Omer Estep, *a pipefitter welder*, Johnson has testified (credibly) that Estep's wage rates and companies he worked for indicated to Johnson that all his listed experience was with union (construction) employers (Tr. 5094 and 5111; R. Exh. 219(a)). (I note, however, Estep did not apply until January 30, 1990, and he did not write on his application he was a volunteer union organizer.)

Five more had their most recent employment on a crew with the above struck union employer Hughes, thus: Carl Alexander, labor(er) (Tr. 5091 and 5108; R. Exh. 213(a)); Jeffrey Lang, pipe foreman (Tr. 5091–5092 and 5108; R. Exh. 214(a)); Daniel Patterson, a carpenter (form builder) & pipefitter (replacing pipes and valves) (Tr. 5092–5093 and 5108–5109; R. Exh. 215(a)); William Patterson, carpenter (building and setting forms) and serviceman (plastic fusion & installing underground pipe) (Tr. 5090 and 5106; R. Exh. 212(a)); Ronny Roush, a truckdriver—plastic fusion & labor (Tr. 5093–5094 and 5109; R. Exh. 217(a)).

Of the 14 relied on by Employer only Robert Wooding's recent employment (for 1 week) appears unclear. Wooding's second most recent job (that lasted 3 months), Vecellio and Grogan, was identified from wage rate as a union (construction) job (and, to that extent, suggests his first was too, though his third prior job paid more, but appears acceded to be known as nonunion) (Tr. 5088 and 5105; R. Exh. 207(a)). Employer acknowledged that the five employed by C. J. Hughes were a crew of that company that was on strike. Johnson testified they were hired at request of the client, an asserted political decision for Brown & Root.

Fisher filed application for employment with Brown & Root on January 10, 1990; Alexander on January 11, 1990; and Roush on January 22, 1990. Lang's application is undated, but he listed last employment with Hughes ending January 1, 1990, and his reason for leaving, ''Company went on strike.'' D. E. Patterson had apparently filed an application with Brown & Root on September 15, 1989, having then left Hughes for ''lack of work.'' When called by Brown & Root on September 26, 1989, however, he was then not available, as then recalled by Hughes. W. Patterson had similarly applied for employment by Brown & Root on September 14, 1989, but it is unclear whether he was also laid off at the time. (His application does not appear updated in January.) Roush's application confirms leaving Hughes in January 1990, with reason assigned, ''Union is on strike.'' The above and other evidence of record sufficiently convinces that the above Hughes crew was first employed by Brown & Root during duration of a strike at Hughes that commenced on or about January 1, 1990, and the employees essentially constituted an underground utility crew that Brown & Root *first* employed at Rhone-Poulenc, commencing on various dates between January 10 and 22, 1990.

Employer next argues in reply brief (appendix 3) that to the extent the Charging Party has implied a statistical argument for the claimed antiunion animus, namely, that the percentage of Brown & Root's hires with a nonunion background is somehow disproportionately low, Employer contends the implication is misleading and completely erroneous because the information necessary to make this legal conclusion is simply not in the record.

In support Employer relies on record evidence of Johnson's receipt of between 550–700 applications (obtained and interviewed by Johnson between September 1989 and February 1990) through Job Service (Tr. 4962). Employer asserts, however, that these applications constituted fewer than 50 percent of the total number of applications that the Job Service received. There were over 1000 additional applications (that Johnson counted, as of April 1990) that the Job Service never provided to Brown & Root (Tr. 4962). The Employer observes no inquiry was ever conducted into how many of the applications (either the ones Brown & Root received, or the ones it did not) had indicated union or nonunion background. Hence, Employer argues there cannot be any implication Brown & Root's hiring of employees with union backgrounds was disproportionately low compared to its hiring of employees with a nonunion background.

Employer contends to make such an argument, the General Counsel or the Charging Party would have to show that the percentage of hires with a union background (i.e., ratio of

union hires to union applications) was significantly lower than the percentage of applicants with a union (sic, but seemingly nonunion ratio of the nonunion hires to nonunion applicants) background. See, e.g., *Rowe v. Cleveland Pneumatic Co*., 690 F.2d 88, 94 (6th Cir. 1982) (in analogous Title VII race discrimination hiring case, low percentage of minority employees is insufficient to show discrimination; plaintiff must compare percentage of minority applicants to percentage of minority employees). In Brown & Root's case, no such comparison is possible on this record; hence, so Employer argues, no such argument can stand, whether express or implied.

First conclusion: A strong prima facie case

Section 8(a)(3) prohibits an employer from discriminating ''in regard to the hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.'' An employer violates Section 8(a)(3) of the Act in refusing to hire an applicant, if the refusal is based upon the applicant's union membership or activity. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Lewis Mechanical & Metal Works*, 285 NLRB 514 (1987), and *Stop-N-Go Foods*, 279 NLRB 777 (1986). An employer is obligated to consider all applications for employment without discrimination, *Shawnee Industries*, 140 NLRB 1451, 1452–1453 (1963), enf. denied on other grounds 333 F.2d 221 (10th Cir. 1969); *Alexander's Restaurant*, 228 NLRB 165 (1977), and *KRI Constructors*, 290 NLRB 802 (1988).

The elements of a prima facie refusal-to-hire case were discussed in *Big E's Foodland*, 242 NLRB 963 (1979):

> Essentially, the elements of a discriminatory refusal-to-hire case are the employment application of each alleged discriminatee, the refusal to hire each, a showing that each was or might be expected to be a union supporter or sympathizer, and further showings that the employer knew or suspected such sympathy or support, maintained an animus against it, and refused to hire the applicant because of such animus. [242 NLRB at 968.]

See also *Hoboken Shipyards*, 275 NLRB 1507 (1985); *Lewis Mechanical & Metal Works*, supra (prima facie refusal-to-hire case established where shown that discriminatee applied for employment, employer knew of union membership and employer expressed opposition to hiring union members). The General Counsel correctly observes because direct evidence of antiunion motivation is rare, proof of discriminatory intent may be inferred from the circumstantial evidence in the record as a whole. See *Morgan Precision Parts v. NLRB*, 444 F.2d 1210 (5th Cir. 1971); *Act IV Industries*, 277 NLRB 356, 373 (1985). The General Counsel contends, based on the record evidence as a whole, there can be no doubt that Respondent harbored antiunion animus which motivated its refusal to hire all the alleged discriminatees.

In reply brief (app. 2) Employer observes the Charging Party has cited *Lewis Mechanical & Metal Works*, supra, for the prima facie elements of a failure-to-hire case, namely, evidence that a union member applied for employment, that the respondent knew of his union membership, and that the respondent expressed opposition to hiring union members. Employer argues using this analytical scheme, the General Counsel cannot establish a prima facie 8(a)(3) case against Respondent Brown & Root because no Brown & Root official involved in hiring expressed any opposition to hiring union members.

Even apart from any consideration of animus support from Lucas events to be considered in part II (of which there is some found below), the evidence presented by the General Counsel (and Charging Party Boilermakers International) has made out a strong prima facie case that the Respondent Brown & Root has dicriminatorily failed to consider for hire and failed to hire all the above (now) 47 alleged discriminatees named in the complaint, who each had filed applications stating their qualifications that appear to meet, indeed, more often than not, exceed Respondent Employer's stated 4-year heavy industrial experience requirements for journeyperson job, because they had also stated and made clear their individual intent was to voluntarily engage in the Section 7 protected union activity right of being a Boilermakers volunteer organizer of Brown & Root's other employees on the Rhone-Poulenc jobsite, upon their hire.

Moreover, 44 (of the *then* 46 applicants) were denied any employment after interview by Johnson (or presentment of Brown & Root application for employment to Job Service that met the Company's qualifications for jobs for which they otherwise appeared well qualified), in substantial part because they had put Boilermakers Local 667 volunteer organizer (or words substantially to that effect) on their applications, and because Brown & Root, a company with a long-declared policy of operating nonunion, had regarded all who put those words on their applications in this instance as *troublemakers*.

In further agreement with the General Counsel, I find that the reasons given by the applicants for accepting employment at the nonunion Employer at a lower wage rate than they were used to were varied, but also convincing. As shown above, some of the applicants were tired of traveling to jobsites away from their homes in the Charleston, West Virginia area. Some viewed the wages that Brown & Root paid not really that far apart from their union scale and/or some also reasoned relatedly by working in the Charleston area near their home, they would save enough money to compensate for the lower wage.

Some were interested in steady employment at a jobsite that then projected some 2 or 3 years of work. Some were simply committed to a new Boilermakers International ''Fight Back'' plan to take advantage of their right to organize and to go to work for and organize a nonunion contractor that came into their organized area. All testified they were concerned about safety (see below), and all (at least, all that appear were inquired of) have stated credibly that they were willing to work there despite their misgivings about Respondent Brown & Root's safety record and possible unsafe work practices, and they felt they were personally safe workers who could contribute to safety, because of their own variously stated work experience and completion of union-sponsored training programs, and as many felt that they could make the jobsite safer for their community in which they, their fammily, and their friends lived.

Apart from such as may be contrarily indicated from the contended picket line misconduct of individuals, still to be considered, in agreement with the General Counsel, I conclude and find that Respondent has failed to discredit the

mutually consistent and corroborative testimony of all applicant-witnesses, nor did it establish that their assertions of their interests in applying for jobs at Respondent were untruthful or insincere.

A number of applicants but not all have testified that there was a lot of unemployment. Employer, in urging the contrary, points to instances where some applicants had secured employment elsewhere and some in a reasonably short period. Any urging of the Employer to the contrary notwithstanding, however, it seems to me an applicant's being laid off, or out of work at the time of application for employment, is sufficient evidence of genuinely needing work at the time under *Fluor Daniel, Inc*. standards (304 NLRB 970 (1991)). Any additional requirements that applicants must show some high percentage of unemployment in their area or must show in some form there be no alternative source of employment are conditions that, in my view, are not reasonably to be required of an applicant before that applicant may be regarded as a bona fide applicant for employment, though where those factors are found present, they unquestionably are only the more so indicative of bona fide applications, as found in *Fluor Daniel*, supra.

The Union's loss of membership and initiation of a ''Fight Back'' campaign would appear fairly encompassed within Employer's additional observed factor in *Fluor Daniel*, supra, that it was because of hard times that the union in the *Fluor Daniel* case, supra, had stopped enforcing its rule against working for nonunion employers. As to Employer's urging that while (this) *Fluor Daniel* case has emphasized several factors tending to show an applicant's personal need or desire for work, the Employer has argued that it never recognized a desire to organize as a bona fide reason for the Union's members applying. That consideration, however, has been sufficiently answered in the protection clearly afforded the paid union organizer applicant, *Town & Country Electric*, 309 NLRB 1283 (1992), and even when applicants are sent by a union, *Electro-Tec, Inc*., 310 NLRB 131 (1993).

Furthermore, I find that the same strong prima facie showing is made that Respondent Brown & Root had continued in its failure to consider for hire, and failed to hire for discriminatory reasons, all applicants from whom Employer had applications as of the 10(b) date, October 18, 1989, as well as two (Skeens and Wise) of the four shown on file with Job Service, and later including the two (Swisher and Walker) when received on November 22 and 23, 1989, by virtue of Employer's authorized arrangements made with that the state employment agency to handle the filing of applications for employment for it. (While I do entertain some reservations on the matter of completeness of the applications of Swisher and Walker, see *Fluor Daniel, Inc*., 311 NLRB 498 (1993), unlike apparent inability of that employer's treatment of DeWitt's incomplete application to be used to infer animus, Employer here not only did not register deficiency on that account, but neither Employer (nor Job Service as agent for that purpose) sought to interview these indicated highly qualified welders.)

Moreover, the Employer had now, for over 2 months, not hired any of the 45 others who had similarly stated they were Boilermakers Local 667 volunteer organizers, for prima facie discriminatory reasons. In those circumstances, any remaining question as to availability of jobs for qualifications exhibited by Skeens and Wise, who also had words on their application on basis of which Employer was then disqualifying all others, it would seem may appropriately be addressed in any compliance procedure that may be required in this matter, cf., *Sunland Construction Co*., 309 NLRB 1224 fn. 4 (1992).

Though Employer's decision had prima facie clearly discriminatory effect on applicants first on September 25, 1989, when Pribyl made the decision and, pragmatically, when that decision was implemented on September 27, 1989, when Johnson effectively first began material local hires, the earliest 10(b) date of Boilermakers International charge (as shown filed here on April 18, 1990) is October 18, 1989.

Since no applicant with Boilermakers volunteer union organizer on their applications were hired through that date, the strong prima facie presentment made of initial discriminatory refusal to consider for hire or to hire the named 45 applicants (at that time, excluding Thomas) had continued unabated through the start of the 10(b), October 18, 1989 date and, indeed, since none have ever been hired it increased to encompass 47 by November 23, 1989. I conclude prima facie discrimination now stands shown against the 47 applicants named in complaint (with withdrawal of Thomas' allegation) on the basis that Respondent Brown & Root did not consider them for hire, nor hire them, because they had put Boilermakers Local 667 volunteer organizer on their applications (or words to that effect), since October 18, 1989, in violation of Section 8(a)(3) and (1), as alleged in the complaint.

In *KRI Constructors*, supra, the employer not only had an open shop policy, but also in furtherance of that its agent in screening applications had highlighted discerned prior union employment on the applications. In an instance where the status appeared unclear, the agent had written on the application ''*Are these previous employers union? If so we are not interested.*'' Thus, the administrative law judge in *KRI Constructors* concluded, ''The only inference to be drawn from the highlighting of an employee's past association with a union or a business associated with a union is that Respondent considered such affiliation or sympathy in making employment decisions.'' Here the employment agent, Johnson, did not physically highlight any of the applications, but he did bring to Pribyl's attention verbally all of the applicants who had declared on their applications that they were ''Boilermakers Local 667 Volunteer Union Organizer.'' In my view, any difference in this regard is a difference without a distinction.

While the judge otherwise observed in *KRI Constructors* that statistics are competent in proving employment discrimination *Teamsters v. United States*, 431 U.S. 324, 339–340 (1977), he observed that Court's observation that usefulness depends on all the facts and circumstances, id. at 340. In *KRI Constructors* the judge concluded in regard to the statistics advanced on hire that were urged, the employer there had hired certain applicants with a union background that had posed no threat to the employer's operation, by including (pertinently) ''employees who were members of industrial unions rather than a craft or construction union.'' 290 NLRB at 813. Employer's base relied on here appears to similarly do so at least in part.

With the inclusion of Hughes' employees, Employer would appear here to have the better part of the statistical argument. Without their inclusion, more not so. The underlying problem with Employer's argument appears to be the

weakness it points out in the Union's argument. Employer's basic statistics on which it relies in constructing percentages have no bearing on what applications Employer had at the time it decided not to consider for hire, nor to hire, the troublemakers that had written they were Boilermakers Local 667 voulnteer organizers. I do not find the statistical argument of either that persuasive. What the hires show is another matter. The Union advanced argument on contended discriminatory treatment of applicants who wrote they were Boilermaker Local 667 volunteer union organizers applicants.

Statistical argument aside, what is apparent it seems to me from the above hiring patterns is that, plainly, factors other than apparent qualification in years of skill and experience had prima facie caused the Respondent to discount the named Boilermakers Local 667 volunteer union organizer applicants, *Fluor Daniel*, supra, 304 NLRB 970 (1991), and it is as apparent from the evidence of those hired that in material times presently discussed, i.e., on job startup, and even as of October 18, 1989, it is prima facie shown Brown & Root had hired no applicants who had stated on their application that they were Boilermakers Local 667 volunteer organizers, *KRI Constructors*, supra. (Indeed all six employees of the Hughes' underground utility construction crew were not available for work and/or were not hired until January 1990.)

The 8(a)(3) cases are to be analyzed in terms of the test formulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and included is application of *Wright Line* to employer discriminatory refusal to consider for hire and hire cases, *Fluor Daniel*, supra; *Fluor Daniel*, supra, 304 NLRB 970; and see *Eskaton Sun Rise*, 279 NLRB 68 (1986).

The *Wright Line* case reformulated the burden-of-proof test in mixed motive cases. The Board determined that the General Counsel was required to ''make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision.'' Supra at 1089. Once the General Counsel has made the latter showing with respect to motive, the burden shifts to the Employer to establish that its action would have been the same even in the absence of the protected conduct.

After the General Counsel has met his burden of establishing a prima facie case, at that point Employer's burden is greater than just advancing a business justification for its conduct. It must prove that the reason it advances is its true reason for having engaged in the conduct. See *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

C. *Brown & Root's Illegal Picketing and Other Defenses*

Employer's defenses are essentially distilled down to its claims that all (now 47) Boilermakers applicants have forfeited any right to employment with Brown & Root because of their participation in certain picketing that Employer contends has violated Sections 8(b)(1)(A), 8(b)(4)(i) and (ii)(B), and 8(b)(7)(C) and related considerations. The factual base offered in support of these defenses is substantial.

Employer basically contends that all the Unions have engaged in illegal picketing from the outset, even before Brown & Root was on the jobsite. Employer, in its reply brief (appendix 9) asserts that illegal picketing, not union affiliation, was the reason for its refusal to hire. Respondent Brown & Root asserts that it refused to hire the organizer-applicants because they were self-declared agents, not merely adherents, of a union that Brown & Root knew was directing a campaign of violent, unlawful, secondary, and recognitional picketing against the Company. Employer asserts had the applicants disavowed the Union's unlawful conduct, had they indicated they were union supporters but not organizer-agents, or had the picketing not had a clear object of stopping Brown & Root's work for Rhone-Poulenc, this would be a very different case. But none of those factors is a part of this case. Hence, the General Counsel cannot glibly assert it was the organizer-applicants' union affiliation that caused Brown & Root not to hire them, as distinct from their status as declared agents of a union that was simultaneously involved in a campaign to stop the Company completely from operating at Rhone-Poulenc.

Of special note is Employer's (disputed) contention that Boilermakers Local 667's agents were captured on videotape engaging in unlawful secondary picketing at neutral Rhone-Poulenc's main gate on at least three separate occasions prior to the 10(b) date of October 18, 1989. The argument is made that because of such secondary conduct occurrences (and similar secondary and other 8(b)(1)(A) incidents at Brown & Root's gate before October 18, 1989, below), that Employer was privileged not to hire any named Boilermakers applicants.

1. Further picket line conduct in September at the main gate

a. *Picketing, signs, and handbilling at main gate on September 19, 1989*

Employer *first* relies on contention of Boilermakers secondary conduct that McCormick and another man in a Boilermakers' jacket were among pickets at the main gate on September 19, 1989 (Tr. 3663–3665 and 3667; R. Exh. 107, September 19, 1989, 6:17). (This is the first of three such incidents Employer has relied on to establish Boilermakers Local 667 engaged early in illegal 8(b)(4)(i) and (ii)(B) picketing. The other similar incidents relied on are on September 25 and 27, 1989, below.)

Kilburn recounts that picketing began (again) at Rhone-Poulenc's main gate on September 19, 1989, about 5:45 a.m. and had continued until about 7:45 a.m. There were about 40 pickets at the main gate and several at the contractors gates. At the main gate pickets were passing out (the same) literature, and the same signs were present. Kilburn relates, as before one sign said, ''*Rudy Shomo doesn't tell the truth.*'' Another sign said, ''*Give the boot to Brown & Root.*'' Kilburn believed that was the first time that he had seen that sign. There were admittedly other safety signs in use. Kilburn initially testified Bobby Thompson, Fisher, and also McCormick as amongst the pickets at the main gate this day.

On the General Counsel's cross-examination of Kilburn on the videotape for September 19, 1989, Kilburn could not then specifically identify McCormick on tape excerpts provided for this day. (To the extent Kilburn arguably appears of record to have identified McCormick as one of two pickets present on video that day earlier at 6:17:28, I am not persuaded thereby. Nor am I persuaded of any suggestion that McCormick was present at the main gate in connection with the related signs on this day. See, e.g., McCormick described in Respondent's Exhibit 107, video of September 27, 1989

(7:10:28 a.m., Tr. 3698) and compare with present September 19, 1989 (6:17:28, Tr. 3663, 3665; 7:29:36, Tr. 3667).

It is contested by the General Counsel and Boilermakers International that the man identified by Kilburn as wearing a Boilermakers jacket at 6:17:28 a.m. was wearing one. On cross-examination Kilburn acknowledged that no letters were visible on the jacket on the video. Kilburn then stated, however, his assertion was based on what he saw that day, which the General Counsel then argues is infirm considering the time passage and the number of incidents the witness reported on. Kilburn then relied on a summary in his affidavit when he had the whole tape, with assertion he would not have said he was there, if he was not there, he would not do that. Kilburn acceded he may not have seen McCormick on the tape, but repeated he would not say he was there, if he was not.

Kilburn impressed me as a generally credible and reliable witness. But that does not insulate him from having made a mistake in a prior summary. Tape excerpts offered to support his recollections in this particular respect are deficient. Review of the videotape does not establish to my satisfaction that McCormick was there. Neither witness, Kilburn nor I, can read the sign that was held by the man in what appears to be a white jacket on September 19 at 6:17:28 a.m. Although there is a man in a white Boilermakers jacket visible later that day, 7:29:30 (who does appear comparable), he is there with a number of other pickets. Moreover, Kilburn never could identify him, even then and, finally, that individual turns his sign into a collector of signs, without an opportunity for sign identification.

The sign that was held by other individual present at 6:17:28 (who is also unidentified) with the above-questioned boilermaker is identifiable (shortly thereafter) as, ''*Rudy Shomo doesn't tell the truth.*'' In that regard Kilburn also recalled that he had been earlier advised by Shomo that there might be some complications, or controversy, because of some words (had) with the local *building and trades* counsel (sic, in context, I find more likely Council), that they were upset that we allowed Brown & Root to bid (Tr. 3829).

Otherwise, it is established that by 7:07 a.m. there were approximately 20–25 pickets standing in front of the chain link fence, but standing west of the main gate entrance, off the road, on the berm, and with a number of them holding up signs for those arriving to read and others continuing to pass out the literature from prior days. Video for this day (R. Exh. 107, 07:29:36) does show a man in a white Boilermakers jacket (otherwise unidentified), who stands in front of a picket (whom Kilburn also never identified) that carried a sign that says, ''*Give the boot to Brown & Root.*'' It is not established that a man in Boilermakers jacket carried any such sign that day. None of this is *directly* attributable to McCormick nor to Boilermakers Local 667 nor to any named Boilermakers applicant.

Kilburn testified when Bobby Thompson arrived, he saw Thompson take signs out of the trunk of his car, and after signs were collected they were put back in Thompson's car. Kilburn relates (credible) general observations that when Bobby Thompson arrived, pickets would gather around him, Thompson would pass out signs, and he would pass out literature to be distributed. If there was a problem and police were involved, Thompson would talk to the police. (Kilburn asserts specifically on October 10, 1989, Bobby Thompson was the spokesman for the picket group, in discussing an incident of gate C blockage (below), and from time to time Kilburn's security people had also had discussions with Bobby Thompson. Kilburn has testified that when Bobby Thompson was not there, Fisher would similarly take charge and direct picketing at the main gate. Kilburn has described seeing the same movements of pickets to Fisher and his car. Kilburn testified if neither of them were there then it would be McCormick and Tommy Thompson (in charge) from time to time.

Objection colloquy and video evidence makes it appear sufficiently clear in regard to this day, not only that McCormick's collection of signs at the main gate on this date was not on tape, but also to extent that it is indicated of record in Kilburn's testimony that McCormick was there, it is not supported by videotape and Kilburn was in that regard recalling such from memory. Kilburn conceded that when either Bobby Thompson or Fisher was there, McCormick had played no leadership role. It is only when they are not there that Kilburn asserts McCormick did play a leadership role, and he was observed ''Passing out the signs, picking up, passing out the literature . . . seeing that . . . the pickets were in certain locations and the [sic] activity.'' On this day, both Thompson and Fisher were clearly there, and McCormick is not shown there. In the end, I conclude and find it has not been sufficiently established by convincing evidence that McCormick was there, and certainly not shown he was in charge of the picket line at Rhone-Poulenc's main gate on September 19, 1989, such as to be responsible for all signs in use there. McCormick asserts that this was a campaign against Brown & Root brought in the name of SAFE, and McCormick was supportive of the SAFE protest.

b. *The Building Trades finance of the SAFE campaign (R. Exh. 46)*

Charleston Building Trades Council, by Thompson's letter dated September 22, 1989 (R. Exh. 46), wrote all of its affiliated local unions on the subject of a ''Campaign against Brown and Root Company Rhone-Poulenc,'' thus:

> At the *September 21, 1989* meeting to [sic] the Charleston Building Trades Council, the Executive Board made a motion to assess all Local Unions who has [sic] jurisdictions in the Kanawha Valley for the amount of $300.00, this was seconded and carried. [Emphasis added.]
>
> . . . .
>
> The purpose of this assessment, as you know is for the campaign against *Brown and Root*, who already is in the Rhone-Poulenc Plant, Institute, West Virginia.
>
> We must stand together to keep the *Non-Union* companies out of the Kanawha Valley. And as you Know the history of Brown and Root, the poor workmanship and unsafety [sic] habits, we must fight this together.
>
> Please make your check out to S.A.F.E. Address: 1716 Penna. Avenue, Charleston, West Virginia 25302.

WVA and Charleston Building Trades Councils have an office, respectively, at the *same* address.

Boilermakers Local 667 subsequently paid its $300 assessment to SAFE on September 28 (R. Exh. 45, p. 2). McCormick acknowledged that protest(/picketing) at Brown & Root

at Rhone-Poulenc's site was coordinated through Bobby Thompson, assertedly as cochairman of SAFE. McCormick affirmed that there were days when Boilermakers Local 667 took responsibility for manning the protest/picket line and other days when other unions took the responsibility.

The only reference to such in Local 667's minutes occurs on December 9, 1989 (R. Exh. 71), which notably would be approximately the 13th week of the demonstration/picketing, as follows: ''He (McCormick) also reported that beginning Monday morning the Boilermakers would run the demonstration picket daily for a week against Brown & Root. The pipefitters did it last week. Two one-half day shifts would be set up for two or three people beginning at 6 a.m. Monday morning.'' In contrast with Norman below, Kilburn's testimony revealed relatedly (below) that picketing at both the main gate and at Brown & Root's gate C was uneventful during December 1989, and thus inclusive of this period of Boilermakers Local 667 responsibility.

c. *McCormick's support of SAFE*

McCormick otherwise has testified (generally) that a dangerous MIC unit has been operated at Institute for years and appears to (mis)state that there had not been a spill or leak of any dangerous chemicals at Rhone-Poulenc (or Union Carbide) in the last 20–30 years (or at least during the several years that he had been there) before 1989 (sic). McCormick on other occasion has acknowledged that the first time that he started to pay attention whether there were spills was in September 1989 (with Brown & Root's arrival).

McCormick then testified severally that he and his family live in the nearby town of St. Albans, and he wishes it (the MIC unit) was not there (in Institute), but that he has to live with it (being there), that he understood SAFE had originated in the Institute community, and that he knew that it did not arise in any Boilermakers International Fight Back seminar, and he testified explicitly that no one had told him to form SAFE, that Boilermakers Local 667 has supported SAFE financially, and that he has supported and participated in SAFE personally, that SAFE's membership was (open to) the public, that SAFE encompassed more than just labor union members and their wives, that SAFE's membership has encompassed (preexisting) concerned citizen groups (concerned about MIC and the environment), people in Institute, educators, and certain passerbyers (sic), that he was not personally acquainted with them, that he could not name them (with few exception of cochairman, Reverend Gilmore, and a named politician and husband, the latter a member of a local unionized contractor association, that supported SAFE), but whom he knew were from the community and participated.

McCormick testified that he had personally participated in the SAFE protest action because he felt that the community was threatened, that his understanding of SAFE's objective was to put out the information to the community on the unsafe work records of Brown & Root, that SAFE's object in doing so was to show and tell the community what we believed was going on in the plant with the use of unskilled people pulling maintenance on the MIC and other dangerous chemical units down there, and *that he wanted Brown & Root to hire qualified skilled people and, if they did not, he wanted them to leave town, because he felt that his family and the community were (then) in danger*.

To the extent McCormick has testified to a MIC leak occurring in 1989, it is erroneous. There was a MIK leak shown of record as occurring on February 2, 1990, as discussed further below. Charging Party Boilermakers International has introduced tape evidence of the difficuly that certain union personages had in treating their concerns over MIC separately from the (I find) labor dispute described here (C.P. Exh. 20).

McCormick viewed the Charleston Building Trades Council's and Boilermakers Local 667's involvement in SAFE (and McCormick's personal concerns with safety issues) as being just a part of SAFE. McCormick would distinguish all activity in SAFE, from Boilermakers Local 667 fight back campaign of organizing Brown & Root as a nonunion contractor, that McCormick had commenced contemporaneously with Brown & Root's startup of the job. McCormick testified explicitly and repeatedly that Boilermakers Local 667's fight back objective was organizing (Brown & Root).

d. *The picketing, signs, and handbilling at main gate on September 22, 1989*

Kilburn's next reported picketing at the main gate began on September 22, 1989, at 3:50 p.m. and continued until 5 p.m. There were 20–25 pickets at the main gate. (Rhone-Poulenc maintenance people would leave at 4 p.m., and there was a shift change between 5–5:30 p.m.) Kilburn recalled that it rained very hard and he asserts that he could not identify any of the pickets that day, but did see generally they were holding up signs. (The General Counsel established on cross-examination that the heavy rain occured later in the evening of this day.) One such unidentified picket held up a sign (I find) that said, ''Consider Community safety.'' A few pickets were in the highway, handing out the above literature to motorists. It was also being passed out to employees entering the main gate.

e. *The picketing, signs, and handbilling at the main gate on September 25, 1989*

Second Employer relies on the contention that secondary conduct on the part of Boilermakers Local 667 is shown on September 25, 1989, in that it asserts that McCormick, Thomas, and several pickets wearing Boilermakers jackets were among pickets at the Rhone-Poulenc main gate on that day (Tr. 3686–3690, 3692; R. Exh. 107, September 25, 1989, 6:11–6:12, 6:27, 7:09).

Kilburn noted the next picketing was on September 25, 1989. There were approximately 35 pickets at the main gate. On this day pickets were on both the *west* side of the main gate entrance (as before), but now there were some also on the east side. The pickets (on the west side) held signs, signaling vehicles to blow their horns. Employer contends in brief that Kilburn relates present were Bobby Thompson and McCormick. Also present were Bill Thomas and several pickets (in jackets) with the word Boilermakers on their back. (This is the second incident on which Employer relies to establish that McCormick and Boilermakers Local 667 picketing at Rhone-Poulenc's main gate was with an illegal secondary objective.)

Kilburn initially testified, ''And present was Bobby Thompson, Bill Thomas, and several pickets with Boilermakers on the back.'' Kilburn only later added McCormick

there. He subsequently identified Thompson, and he identified Thomas on the videotape (R. Exh. 107), September 25, 1989, but not McCormick. Nor did my own review discern McCormick there. On cross-examination Kilburn related that he recognized Thomas, because Thomas probably was someone that he had asked to be identified. (See the admissions of Kilburn below on making inquiries of Rhone-Poulenc employees, identifying significant picket actors, and then passing that information on to Brown & Root.) Kilburn also recounts that at one point a picket had shined a bright flashlight into the camera, as a result of which Kilburn could not see. Kilburn recounts that the pickets left at 7:30 a.m., but on this day they joined the other pickets that were at gate C. According to Kilburn, it was the first time that had happened.

Kilburn's testimony aided by notes (with video corroboration) was one sign in use said, ''*Rudy Shomo lies.*'' Another sign which Kilburn testified from notes said, ''Say No, call 747–6000'' is not readily apparent on the video. Nor is it 1 of the 46 signs listed in a summary of signs on Respondent's Exhibit 117, almost all of which Kilburn recalled were used at the main gate. One picket standing on the *east* side of the main gate entrance held a sign that said, ''*Send Brown & Root packing.*'' Kilburn (again) testified he had been unable to identify who that picket was. Employer would have observed the pickets were stranger pickets to it. But even that is not shown necessarily so with regard to significant actors and picketers at the main gate, in light of Kilburn's admissions of his ongoing attempts and success at identifying significant picket line actors and, indeed, of his passing such information on to Brown & Root, except in specific instances (such as here) where Kilburn relates he had been unable to identify a person holding a sign. The first two incidents urged of McCormick's presence and picketing at the main gate simply appear not well supported.

Thomas' early support of SAFE

In contrast, Thomas affirmed he did picket outside Rhone-Poulenc jobsite of Brown & Root, but asserts he picketed only to raise safety concerns, and he only carried safety signs in protest of safety issues in the plant. There is no evidence to the contrary. Thomas asserts he was picketing to inform the public of what he felt was an unsafe condition inside a plant that was one of only two in the world that produced the deadly chemical MIC. (McCormick had questioned whether the Bhopal plant was still operational.) When then asked why Thomas had advised Boilermaker's union members to apply for work at Brown & Root, when Thomas felt Brown & Root was an unsafe contractor, Thomas said, ''The alternative was to let things go as they were and accept what we felt like was a contractor who would hire inexperienced people. Verses (sic), the idea of organizing and getting those people some training, seeing to it that they were qualified to do the job'' (Tr. 184).

It appears to be uncontested of record that Rhone-Poulenc's facility in Institute, West Virginia, is the only other facility in the world, aside from Union Carbide Plant in Bhopal, India, which produced the deadly gas MIC (Tr. 1122), and it was common knowledge throughout the world and/or I find it was so at Institute and its surrounding communities that a single leak of this gas in Bhopal had killed thousands of people who lived near the Bhopal plant. On December 3, 1989, a rally was held by SAFE at the State Capital on the fifth aniversary of the Bhopal tragedy (December 2–3, 1984, below).

Thomas also testified concerning his own appearances as a representative of the Boilermakers Union at various community groups concerned with safety. Thomas testified that he felt that he was asked to speak at such groups because he could present the Union's position on the Boilermakers' training and their skill versus the unskilled people who might be working in dangerous jobs (Tr. 222). Thomas also testified he was aware of the concern from the community in general over the use of a group of untrained employees by Brown & Root in its job at Rhone-Poulenc, through articles in the newspaper about other citizen groups that had concern over incidents that had happened at the Rhone-Poulenc chemical plant (Tr. 223).

f. *The picketing and signs used at the main gate on September 27, 1989*

Third Employer relies on contention that secondary conduct on the part of Boilermakers Local 667 is shown on September 27, 1989, in that Respondent Employer asserts that McCormick is present among other pickets at the main gate with unlawful signs, ''Give the Boot to Brown & Root'' and ''Send Brown & Root Packing'' (Tr. 3696–3698; R. Exh. 107, September 27, 1989, 7:10).

Kilburn testified that picketing at the main gate on September 27 began at 6 a.m. and continued until 7:45 a.m. There were approximately 30 pickets. In the early morning, one or two of the pickets held a big sign that said: ''*Want your job Brown & Root.*'' Other pickets had signs that said, ''*Give the boot to Brown & Root,*'' and ''*Send Brown & Root Packing.*'' None of the pickets who held any of these signs are identified. Employer's argument rests on presence of McCormick, who was admittedly not in charge that day.

Kilburn has testified (Tr. 3936) and this time confirmed the same as on videotape (albeit at a different time, 40 minutes later, compare Respondent's Exhibit 107, September 27, 1989, 6:29:34, and 7:10:28) that Bobby Thompson, McCormick, and several pickets in Boilermakers jackets were present. On this the third and the last incident of McCormick's presence at the main gate on which the Employer has relied to show McCormick and Local 667 participation in 8(b)(4)(i) and (ii)(B) picketing at Rhone-Poulenc's main gate *prior to* October 18, 1989, McCormick is shown present, but not in charge. Thompson is present and in charge.

On cross-examination, the General Counsel established that there were no incidents of any claimed throwing of cheese or rocks at the main gate on this (or any) date. There was no picket patrolling across the main gate. There was no blocking of entrance or exit at the main gate, no cursing, or threatening at the main gate at all, ever. In short there was no instance of any independent 8(b)(1)(a) picket line misconduct at the main gate claimed to have occurred at any time. There was only the demonstration/picketing in manner described above and below and from time to time handbilling and/or a distribution of certain notable materials as next described.

g. *The picketing, signs, and distributions at the main gate on September 29, 1989*

Kilburn's next reported picketing at the main gate began on September 29, 1989, at 3:30 p.m. and continued until 5:25 p.m. There were approximately 25 pickets at the main gate. In addition to holding signs, the pickets began distribution of adhesive-backed sticker decals. Bobby Thompson was present. Kilburn observed Thompson, while standing within Rhone-Poulenc's property line entrance (as shown by being within roadway yellow line extension in line with chain link fences there), hand something to a picket with a Boilermakers jacket (but otherwise unidentified) who handed it, something round like the sticker, to a motorist then leaving the plant. *The decal bears Brown & Root's name, with a circled negative crossbar imposed* (R. Exh. 114). On cross-examination Kilburn acknowledged that it (Rhone-Poulenc) had certain employees who were turning distributed material into him. Sometimes the employees gave it, and sometimes they would ask (them) to get the literature.

2. Related activities of the VA Building Trades, the community activities of SAFE, and Boilermakers Local 667's response

a. *VA Building Trades' call on September 29, 1989, for broad union financial support of Charleston Building Trades' campaign against Brown & Root to be conducted on basis of the Company's safety record*

By Fisher letter dated September 29, 1989 (R. Exh. 64), the WVA Building Trades Council informed all its affiliated local unions:

> As you probably have heard by now, Brown and Root is in the Rhone-Poulenc plant at Institute, West Virginia.
>
> Rhone-Poulenc elected to employ Brown & Root to construct a chemical waste incinerator and do any other work that might be assigned to them.
>
> There has [sic] been as many as eleven different Building Trades Contractors using skilled Building tradesmen in the Rhone-Poulenc plant for the past two years. Now Rhone-Poulenc says they only want one contractor, Brown and Root. All the Building Trades Contractors and worker's [sic] will be replaced.
>
> By direction of the board of Business managers, from each respective craft union, the Charleston Building and Construction Trades Council has started an extensive campaign against Brown and Root.
>
> To date Charleston Building Trades Business manager, Bobby Thompson, has gathered documented proof of Brown and Root's unsafe work records, shoddy work habits, enormous cost overrun, on projects in other states.
>
> Also, the Charleston Building Trades have hired a public relations person to research the documents and prepare fliers to inform the citizens of the unsafe work habits, etc of Brown and Root.
>
> On September 19, 1989, the West Virginia State Building and Construction Trades Council, AFL–CIO's Executive Board approved the action of the Charleston Building Trades Council, and approved a meeting for the State Building Trades Council to contribute up to $5,000.00 to support the Charleston Building Trades Council in the campaign against Brown and Root. The Delegates at the convention of the State Council approved the Executive Board action.
>
> The Charleston Building Trades Council has set up a separate account, known as (S.A.F.E.) Safety and Fair Employment. Most of the local unions and associations have agreed to support the council with contributions, ranging from $300.00 to $1,000.00, but as you know this is going to be a very expensive campaign. So I am asking that each local union, in the state [sic], inform the membership of the fight we are up against. Not just in Charleston, Brown and Root has the ear of every industrial plant manager in the state.
>
> I am suggesting, and I think necessary, that each local union prepare a paper to be distributed on all projects, giving our membership the opportunity to contribute financially. Because I am sure they realize what it means to them if we lose this fight against Brown and Root.
>
> Make checks payable to S.A.F.E. and mail to Charleston Building Trades Council, 1716 Pennsylvania Avenue, Charleston, W.V. 25302.

At the hearing, Fisher testified that the seventh paragraph above was badly worded and that the $5000 was support for SAFE. Fisher testified the purpose of the letter was to get contributions from the local unions and workers or citizens to help with the safety campaign. As of October 18, 1989, WVA Building Trades Council had paid $3000 on September 21, 1989, *to SAFE* (R. Exh. 45, p. 2).

Employer would have observed the statement contained in the WVA Building Trades' executive board meeting and advisory board meetings (held on September 19 and 20, 1989) dated September 27, 1989, ''Remember, we cannot afford to allow Brown & Root to remain in West Virginia. We must all band together and make this a state wide fight'' (R. Exh. 361). I also note ending direction made there, ''If you have any suggestions or recommendations please contact Bobby Thompson at . . . or Allen Fisher . . .'' (and not McCormick).

b. *SAFE's ''Danger!'' bulletin to the community*

The record reveals that about this same time (early October 1989) Kilburn accidentally became aware that Thompson was actively engage in distribution of a 10-page ''Danger!'' bulletin throughout the general community (R. Exh. 110, Tr. 3708–3709). Kilburn saw a copy of the pamphlet that Thompson had left at the office of a dentist they commonly used. Employer shows that on page 9 thereof (public) readers are told what they can do to protect themselves from dangers related therein, they are to call or write Rhone-Poulenc, and the readers are to, ''Tell them to hire quality West Virginia construction companies and their union workers. They're your neighbors.'' This 10-page ''Danger'' bulletin expands on matters summarized in paragraph 5 above in Fisher's letter, with certain specific examples provided on each of several claimed Brown & Root deficiencies. The bulletin declares on its back page that it was prepared and distributed by SAFE, with Gilmer and Thompson identified as cochairmen. The bulletin states it is ''For Public Information Puposes Only.''

c. *Boilermakers Local 667 letter to its stewards*

In a letter to stewards, dated October 5, 1989, Local 667 Business Manager McCormick and Secretary-Treasurer Lovejoy informed their stewards (on the basis of the letter):

> Attached is a copy of letter dated September 29, 1989 from E. Allen Fisher, Secretary-treasurer of the West Virginia State Building and Costruction Trades Council, AFL–CIO, wherein he is advising all affiliated Local Unions of the battle being waged against Brown & Root, a large non-union contractor, who has begun contract and maintenance work at the Rhone-Poulenc Chemical Plant in Institute, West Virginia.
>
> Many of our members who could help have joined in the fight by attending the rallys, passing out handbills, getting signatures on protest petitions, and helping carry signs at the Plant entrance. We are grateful for your help. One thing is certain. If we cannot stop Brown & Root at Rhone-Poulenc, we can expect to see them in other areas.
>
> To be effective the Charleston Building Trades will have to continue waging an expensive campaign to reach the public and inform them of Brown & Root's unsafe work records, shoddy work habits, cost overruns, etc. The financial support already promised by the Local Building Trades Locals is not enough. All West Virginia Local Unions are being requested to take up job collections to be used in this ''Fight Back'' campaign.
>
> To do our part, we are requesting all job stewards start a voluntary job collection as soon as they can to help support this effort. All monies collected by you must be made payable to S.A.F.E. and mailed to Boilermakers Local 667. After we record your collection, we will then foreward the money on to the Charleston Building Trades to help pay the expenses incurred.
>
> A letter from the State Building Trades is enclosed for your use. It contains a clear definition of what is happening.
>
> Your help in this fund drive will be appreciated.

(1) Local 667's payments to SAFE

Although Boilermakers Local 667 had initially locally authorized (and then secured International's approval) of a contribution of up to $1000 of Local treasury funds to support SAFE, through the hearing date only $428 had been paid out of Local 667's treasury funds, namely, the $300 payment made to SAFE on September 28, 1989, on assessment made by the Charleston Building Trades, and a questioned $128 which was paid by Local 667's treasury in reimbursement for money order payments (for certain attendance fees), and then charged to SAFE expense. The fees expended were for attendance of two Boilermakers members and two wives of Boilermakers members at an ABC meeting at which Brown & Root's safety supervisor, Thorn, was sheduled to give a talk on safety to member and nonmember contractors of the local ABC Contractors Association on November 17, 1989.

(2) An overview of SAFE's financial support

Through Boilermakers Local 667 steward collections held on jobsites, other contributions were made to SAFE. Thus, exclusive of the $300 Building Trades' assessment, and the questioned $128 attendance fee payment paid out of Local 667's treasury funds, Local 667 paid $6,852.45 to SAFE from the contributions its stewards collected in 1989, principally paid in October and November. (The sum of $1,1081 in such contributions was paid to SAFE along with the $5000 contribution received from Boilermakers International (below) on November 2, 1989, R. Exh. 311.) Boilermakers Local 667 paid an additional $2,607.52 in contributions through March 23, 1990. From all sources, including the $5000 contributed by Boilermakers International, Local 667 paid in total $14,887.97 to SAFE (being the sum of the $300, $128, $6,852.45, and $5000, paid in 1989 and the $2,607.52 paid through April 26, 1990 (R. Exh. 266; Tr. 5184). Of the total $56,639.11 paid to SAFE from all sources (but unmistakeably principally unions) in that 1989–1990 period, Local 667 paid 26 percent ($14.887.97 ÷ $56,639.11).

McCormick testified that these contributions for SAFE were collected on jobsites from members of Boilermakers Local 667 and ''lots of others.'' He also testified that no funds of Boilermakers Local 667 were paid to the Building Trades, but to SAFE, and he was confident that all money (including $5000 it requested and received from Boilermakers International) was spent on such advertisements, etc., and not on Building Trades salaries, in an effort to make the community aware of what was happening.

3. Continued picket line conduct at the main gate and related events

a. *Picketing at the main gate on October 4, 5, and 9, 1989*

Kilburn recounts there were about 15–20 further incidents of picketing at the main gate between the beginning of October and November 6, 1989. On *October 4, 1989*, there were approximately 10 pickets at the main gate. At about 6:36 a.m., two pickets were in the median strip, holding signs and passing out literature in the roadway. The remainder of the pickets were south of Route 25, back toward the main gate entrance, but standing east of the main gate entrance, along the road, not in the roadway entrance. Kilburn recalled that about 7:20 a.m. state police came by and asked (certain) pickets, who then did not have signs on, to move out of the roadway and they were gone by 7:30 a.m.

On *October 5, 1989*, there were three–five pickets holding signs, between 6:15 to 7:20 a.m., on the east side, or corner, of the main gate entrance. Kilburn relatedly testified that by about October 4 or 5 of this month, Rhone-Poulenc had observed that the majority of the picketing had moved from the main gate to gate C. There was continuing picketing at the main gate, involving anywhere from 1 to possibly as many as 15 pickets on a certain day, but all picketing activity by this time had essentially moved down to gate C and, in Kilburn's view, it had become more agressive there (below). On *October 9, 1989* (seemingly a holiday, with Rhone-Poulenc plant shut down, below), Kilburn had related they probably had one–three pickets at the main gate.

b. *Boilermakers Local 667's request for Boilermakers International financial support for SAFE and related events*

By letter of October 12, 1989 (R. Exh. 88), McCormick wrote International President Jones:

> Perhaps by now you have been made aware that Brown & Root has begun a three year construction and maintenance contract with Rhone-Poulenc at Institute, West Virginia. This is going to be an expensive battle undertaken by the West Virginia State Building Trades and its affiliate, the Charleston West Virginia Building Trades, as well as every union member and concerned citizen living in the vicinity of this plant. The Rhone-Poulenc plant produces the deadly chemical MIC and the people living in the area cannot afford another Bhopal, India incident. With Brown & Roots [sic] shoddy work record it could become a reality.
>
> The Building Trades have [sic] been successful in disrupting the job through demonstrations at the Plant site entrance, handbilling, and Ralleys [sic]. We have received some favorable newspaper coverage and some not so favorable but we can expect that.
>
> To continue this fight the Building Trades has become a part of the Safety and Fair Employment, (S.A.F.E.). The Business Manager of the Charleston Building Trades is co-chairman of this organization.
>
> This is going to be an expensive fight and we need all the help we can get. We are doing all we can but advertisement in the newspapers, radio, and television is very expensive. We are asking the International to consider making a substantial contribution to S.A.F.E. to help us finance this campaign. Manpower has been holding up on the demonstrations, union members on the jobs are contributing voluntary financial assistance, but it is a never ending battle. I believe everyone is motivated to see a satisfactory ending to this effort if fight back funding is supplied. A generous contribution of $5,000.00 or whatever monies the International Brotherhood can provide to support this fight will be appreciated.
>
> I am enclosing copies of correspondence we have received from the State Building Trades, our letter to our job stewards, and a pamphlet produced by S.A.F.E. for your information.
>
> A response at your earliest convenience will be greatly appreciated.

Local 667's related minutes of its November 11, 1989 meeting

Boilermakers Local 667's subsequent minutes of November 11, 1989, record that by letter of Boilermakers International President Jones dated October 25, 1989, he approved McCormick's above request (of October 12, 1989), and stated he is making a $5000 contribution to SAFE. The notes further record, however, ''It is being sent with the understanding that it will be used for advertising in the newspapers, radio and television and not for salaries or expenses of Building Trades Representatives.''

Also read to the Body on that occasion were two letters dated November 6 from Bobby Thompson written as co-chairman of SAFE. The minutes record:

> One letter is advising of a Forum to be held for the purpose of letting the public and union members know that Rhone-Poulenc and Brown and Root are jeopardizing our safety and the environment of the Kanawha Valley. This Forum will be held at West Virginia State College, Wallace Hall, Room 122, December 5, 1989 at 7:00 p.m.
>
> The other letter is informing all affiliated local unions that a Mass Rally will be held December 3, 1989 at 1:00 PM at the Capital Complex Staging Area in memory of the Bhopal Tragedy. He is requesting everyone make an effort to attend.

The referenced Bobby Thompson's SAFE letter of November 6, 1989, regarding the rally at the Capital (R. Exh. 70), in pertinent part stated:

> We hope to have some nationally known environmentalist, along with several local environmentalists and concerned citizens to speak.
>
> We feel that Brown and Root USA, Inc. which is doing the construction and maintenance work in the Rhone Poulenc plant at Institute, West Virginia is unacceptable, as their pass [sic, in context, past] records has indicated of their safety background.
>
> We are asking Brown and Root USA, Inc. to *leave*.

When asked about the last statement, McCormick replied only that was Bobby Thompson's letter. In other context, but relatedly, McCormick has testified that it is not majority rule in the Building Trades. If you agree, you do it. If you do not agree, you do not do it (Tr. 1558). McCormick testified that he wanted Brown & Root to hire qualified, skilled, safe workers or to leave the Valley, because if it did not, he thought it was a danger to his family and the community, and he did not want another Texas. In the November 11, 1989 Local 667 minutes, however, it is recorded, ''Motion made by Bro. Jim McCormick to include these fliers in our next mailout. Second[ed] & Carried.''

It seems to me that Employer may fairly argue that by such mailing action Local 667 effectively ratified and/or approved the message contained in the flier. The message contained in the flier was Brown & Root's safety background was unacceptable because of their past record. The action urged was to ask Brown & Root to leave but, in a rally, one held away from the plant.

In the same meeting McCormick reported on the status of the Rhone-Poulenc job and possibly one at Dupont at Bell (sic). McCormick reported on Thompson's meeting with Dupont officials who said they were going to open up the bid on replacement of their boilers to four nonunion and four union contractors. Employer would have noted that McCormick commended the Boilermakers, ''for their having supported the demonstrations at the Rhone-Poulenc plant.'' He told the body:

> [W]e have 2 boilermakers and 3 boilermaker wives scheduled to attend an A.B.C. Safety Seminar in Charleston. Brown & Roots [sic] safety supervisor will

be presenting the program. Our plants are attending as contractors and are prepared to ask questions about Brown & Roots safety record.

c. *Picketing at the main gate on November 13, 1989*

On November 13, 1989, Kilburn received a call from one of his security supervisors, Charlie Miller, that Rhone-Poulenc had pickets on their property at the main gate passing out literature. Video shows an unidentified woman passing out literature to cars exiting the plant's main gate at what Kilburn has described as probably their busiest time, 4 p.m., when all maintenance people quit. Kilburn was not present that day.

Kilburn explained the impropriety of the woman handbilling there, as we have a no-solicitation rule on our property, we do not allow anybody to solicit on our property, and we do not want anybody on our property soliciting without permission any way. We do not want the responsibility for someone being hit by a car. Employer established an independent charge was brought by Boilermakers International on May 10, 1990, in Case 9–CA–27511, and the Union's withdrawal of that charge was approved by the Board's Regional Director on June 5, 1990 (R. Exhs. 367, 368).

Videotape confirms that a woman handed out literature on Rhone-Poulenc roadway entrance property (R. Exh. 107, 16:03:51, 16:04:04). On cross-examination, however, Kilburn acknowledged there was nothing to show the woman was a union member, let alone a boilermaker or Boilermakers applicant; she was there for just a few minutes between 4 and 4:15 p.m.; she did not carry any sign nor block any traffic; she just handed out literature to drivers when they stopped their vehicles; the traffic moved freely; and no one asked her to leave, nor did she leave when someone started to go out to ask her to leave. The only other pickets on this occasion appear to be on the road's north side.

Although Kilburn was not there, Kilburn's outstanding instruction to his security force was that anything passed out was to be turned into him as soon as possible. (Kilburn's security force is composed of 5 supervisors, and 11 guards.) On the morning of November 14, 1989, Miller gave Kilburn a copy of a new leaflet that was passed out the prior day (R. Exh. 111).

This leaflet is a 3-page handout addressing the subject of Brown & Root, Inc.'s ''IMPECCABLE SAFETY RECORD AS PROCLAIMED BY MR. RUDY SHOMO . . . .'' The leaflet is addressed to all Rhone-Poulenc's employees and states it was prepared by Charleston West Virginia Building Trades Council ''to expose the facts relative to the poor safety record, and shoddy workmanship, that has followed Brown & Root, Inc., of Houston, Texas throughout the nation.'' The leaflet stated a (claimed) unsafe and deficient work performance record that was one presented as compiled from newspaper articles and union bulletins. It supported claims made with specific details asserted on some 14 Brown & Root jobs in 8 different States.

In letter of McCormick and Lovejoy dated November 29, 1989 (R. Exh. 87), thanking Boilermakers International President Jones for the contribution of $5000 to SAFE, they state:

> This money will be used exclusively in the ''Fight Back'' effort against Brown and Root, USA Inc. who is now doing construction and maintenance work at the Rhone-Poulenc Plant at Institute, West Virginia. The Building Trades have, with very few exceptions, been demonstrating against Brown & Root three days a week during peak traffic hours. We openly want to thank our Boilermakers who have supported this campaign with their presence when called upon.

d. *The rally at the State Capital on December 3, 1989*

The rally on the anniversary of the Bhopal tragedy was held in December 1989. Thomson spoke as spokesman of SAFE, on Brown and Root's (claimed) poor work record. Bobby Thompson had nationally known and local environmentalists speak at the rally (Tr. 2174). Pam Nixon was present and also spoke (at least) to the media of community school and hospital concerns. Otherwise, Carpenters Union is featured prominently on first TV newscast, though an individual with a Boilermakers' jacket appears (with others) carrying a casket with sign on the casket ''Remember Bhopal'' in another excerpt (C.P. Exh. 20, excerpts 4 and 5). Other signs in use state: ''Remember Bhopal''; ''3000 lives lost. I care''; ''MIC gas destroyed Bhopal Are We Next''; ''Demand SAFE''; but also ''Brown & Root Leave''; and (apparently) ''If You Support Us Stop Brown & Root.'' It is warranted to note the weather was inclement.

e. *Picketing at the main gate on December 5, 1989*

At lunchtime, about 11:30 a.m., Ray Schaffer, another security supervisor, informed Kilburn that a hearse and camper had shown up at Brown & Root's gate C, with one parked on one side of the entrance and the other on other side of the entrance. (They began carrying signs in one or other vehicle.) Kilburn recounts they were used to seeing (sign) logos: *Give Brown & Root the Boot, Unsafe,* and ''no pollen [sic].'' (On other occasions a sign *''No pollution''* was seen, and it appears more likely that is the sign referred to here.

In any event, Kilburn relates that on this occasion Kilburn saw a sign on the back of the camper that said, ''Construction Division of AFL–CIO.'' It was not viewable by any Rhone-Poulenc stationary camera, and he had to drive by to read it, which he did. Kilburn then went to get a camera to get a picture of it, but by the time he returned the sign was removed. I do not find reported observance of the limited time this sign was arguably posted, nor hasty removal of the sign, significant on any of the issues presented here. Kilburn has more materially related there was no picketing (at the main gate) through most of December 1989, nor apparently in January for that matter.

f. *SAFE's letter of December 18, 1989, to Rhone-Poulenc and the community safety assessment committee meeting on December 20, 1989*

After stating a certain interoffice memo from local Rhone-Poulenc official to president and chief operating officer of Rhone-Poulenc was way off the mark, but thanking the latter for response to Thompson's SAFE letter of September 25, 1989, Thompson then wrote the latter in pertinent part as follows:

> *Brown and Root's past safety and employment record is strictly the business and responsibility of Rhone-Poulenc until it adversely affects the citizens of*

> *our Kanawha Valley area*. In this regard, I have enclosed copies of numerous newspaper articles concerning Brown and Root that are self explanatory.
>
> While our SAFE Committee is conducting a continuous grass roots public relations program to educate our local community on safety and the environment, we are also truly concerned with the preeminent attitude of Rhone Poulenc Management toward local working people living in the Charleston, West Virginia area.
>
> In this particular instance, contractors from Charleston, West Virginia were not—*we repeat, were not* given any fair opportunity to bid this three year capital construction contract competively, *regardless of Mr. Dille's statement to the contrary*.
>
> . . . .
>
> It is no wonder that many union members here, *including those employed at your own institute plant*, believe that the contract given to Brown and Root was blatantly unfair and awarded in a manner totally inconsistent with the free competitive bidding process . . . . *They also are of the opinion that the Brown and Root episode is still another part of a large scale conspiracy by the Chamber of Commerce and other local large users of construction here to break unions in West Virginia and promote a ''Right to Work'' law*.
>
> In any event . . . . We respectively [sic] request the unrestricted freedom of opportunity to bid fairly without *discrimination because of management anti-union bias*— . . . . [All emphasis is in original.]

Copies of this letter were sent to certain (limited) unions; to Gilmer, cochair of SAFE; to Nixon and Holt of People Concerned about MIC; and various Federal, state, and county elected officials. It is recorded in Local 667's minutes of January 13, 1990, that McCormick gave a lengthy report to the body on activities scheduled by the Building Trades against Brown & Root at Rhone-Poulenc, Institute, West Virginia; and that ''[h]e requested that the members help in the demonstrations when they can.''

The Community Assessment Committee meeting of December 20, 1989

Rhone-Poulenc's communication director, Blashford, testified that the Community Safety Assessment Committee (CSA) dates back to 1985 following the Bhopal incident. Blashford testified that there are actually four CSAs that were initiated by National Institute for Chemical Studies based in Charleston, West Virginia, and each CSA was based at one of the major chemical facilities in the valley. Blashford seemingly related at one point, CSA was formed at Institute West Virginia in April 1988 that covered the Rhone-Poulenc (Carbide and nearby FMC) plant(s). That CSA unit meets monthly, usually at the West Virginia Rehab Center, to review issues of concern and interest to community residents, emergency responders, and plant people. (Apparently all of the four CSAs meet together in a January meeting or at least did so in January 1990.) Blashford, though apparently not a member, regularly attends (75 percent) of the meetings annually, and she attended the material meetings of December 20, 1989, and February 21, 1990.

There were 18 members of the CSA committee as of December 20, 1989, 8 of whom were in attendance at that meeting, including CSA President Charles White, Shomo, and Mildred Holt and Pam Nixon (of People Concerned about MIC group). Twenty five other individuals are regularly copied, six of whom were in attendance, including Ron Bearer and Blashford. The CSA meetings are open to the public and there were 31 others in attendance at the December 20 meeting, including Bobby Thompson, Lovejoy (apparently) Thomas, and 9 of the named 47 Boilermakers applicants (Carpenter, Cox, Dew, Hale, Hudson Sr., L. Johnson (apparently), Morris, Templeton, and Garrett Walker).

Blashford recalled that the bulk of the December 20 meeting (after a brief statement by Shomo) was a presentment by Brown & Root's vice president, Joe Stevens, on Brown & Root's organization, with particular focus on safety and training issues. Blashford testified that at the end of the meeting, Bobby Thompson said he would like an opportunity to present an opposing opinion at a future meeting (which was later arranged for February 21, 1990, below). The minutes of the above December 20, 1989 meeting (R. Exh. 161) thus pertinently confirm:

> 1. Brown and Root Organization.
>
> Rudy Shomo gave an overview of the Institute Plant's past and present approach for contracting capital construction work. In the past the Plant relied solely on Union Carbide Design and Construction group, however, after Rhone-Poulenc's purchase of the Plant, a decision was made to competitively bid capital construction work. Based on the bidding process, Brown and Root was selected as the best qualified to perform this type work.
>
> Rudy introduced Mr. Joe Stevens from Brown and Root Vice President of Employee Relations and Community Affairs.
>
> Mr. Stevens gave a presentation on the Brown and Root organization. The basic theme was ''who we are and our safety performance.['']
>
> . . . .
>
> 3. Charles White extended an invitation to Mr. Bobby Thompson Co-Chairman of the SAFE Committee to appear at a future CSA Committee meeting to present their side of the Brown & Root issue.

g. *Picketing at the main gate on January 25, 1990*

Kilburn testified that there was picketing at the main gate on January 25, 1990, at about 6 a.m., and he testified that it had been some time since they had had pickets at the main gate. On this occasion there were about 10–15 pickets on the public roadway (on the east side of main gate entrance) holding several signs that said, ''*Rest in Peace, Nitro*,'' ''*Rest in Peace, South Charleston*,'' and one that said, ''*Rhone-Poulenc is an unsafe plant with Brown & Root*.'' (Kilburn relates generally that a variety of such signs moved from gate to gate.) Bobby Thompson, Fisher (Sutphin, and Thomas) are present.

Video shows one picket clearly displaying a SAFE sign. Kilburn testified that Thompson, wearing a hat, had a *T-shirt* on that said, ''*Give the Boot to Brown and Root*'' (R. Exh. 107, Jan. 25, 1990, at 7:07:35). It is discernible that Thompson was then wearing a T-shirt with writing on its front. Though the the writing appears not readily legible on video,

in this instance I credit Kilburn, who was more familiar with what the writing on the T-shirt said. All that appears can be read of Thomas' sign on this occasion is that it states, ''Brown & Root is . . . ,'' a sign not listed by Employer (R. Exh. 117). Kilburn otherwise has testified there was picketing approximately 15–20 times in period during the remainder of January through the end of March.

h. *Picketing at the main gate on January 30, 1990*

Eight pickets picketed at the main gate on January 30, 1990, from 6:20 through 8 a.m., and 10 pickets picketed from 3 to 4:15 p.m. Kilburn recounts that the pickets had the signs that they usually had. On that date at 15:54:43 Thomas is present with a sign as is McCormick. *McCormick has a sign around his neck that states, ''This is the result of unskilled labor at Bhopal*!'' The sign had a figure described by Kilburn as an Indian. On cross-examination, Kilburn affirmed this was the day he thought McCormick directed the pickets. On redirect, he testified that McCormick was in charge at the main gate once, but that on other occasions he had directed activities; he had handed out signs, some related to safety, some not. On then further inquiry, however, Kilburn acknowledged that he did not know what the signs had said that McCormick had handed out. Kilburn did not know if McCormick had ever stopped a vehicle, but he was sure that he did not at the main gate as no one did there.

Kilburn has seen (met) Pam Nixon and Mildred Holt. He identified Nixon as a representative of a community (group), and a person with whom he had served on a committee, and Holt had visited an open house event held September 28, 1991. Kilburn at once testified that he did not see either of them on a picket line, but if they said they were there, they were. On redirect Kilburn has identified Concerned Citizens for MIC as a group he relates to (was aware of) and one that has existed since the Bhopal tragedy (in 1984). On another occasion, Kilburn testified generally there was a small group formed who were concerned, probably a dozen people in a community of 3000–4000, and he does not know or believe that they represent the community.

i. *Picketing at the main gate on January 31, 1990*

Kilburn recounts that there were approximately 20 pickets in the morning and the afternoon of January 31, 1990. On this day the camper and the hearse were brought from gate C to the main gate, and they *both* were parked on the east side of the main gate entrance (out of the way of those entering and exiting). McCormick was there. Kilburn testified that he saw McCormick direct where the camper and hearse were to be parked. He saw people upon arriving go up to McCormick and talk to him first, as he had observed before. Some of the signs in use at this time said, ''*Rhone-Poulenc unsafe with Brown & Root*'' and ''*Send Brown and Root back to Texas*.'' McCormick denied generally that he gave instructions to others as to where to stand, be, or move. McCormick has not denied placement of the vehicles.

j. *The events of February 2–7, 1990, and the increased picketing at the main gate on February 7, 1990*

(1) Rhone-Poulenc's internal news brief on February 7, 1990

Corporate Rhone-Poulenc issued the following internal news brief, and it requested assistance in communication of the information to employees:

> Last Friday (February 2, 1990), several incidents occurred at Rhone-Poulenc's plant in Institute, West Virginia.
>
> At noon, plant officials reported that a gasket on a ''syngas'' (synthetic gas) unit leaked hydrogen and some CO, igniting for a short period of time. No one was injured. The syngas unit, which furniushes gas to a number of units at the plant, did not suffer significant damage.
>
> On the same day, a small release of methyl isocyanate (estimated to be approximately one ounce) occurrred when workers were performing routine maintenance on a MIC line. The unit was shut down at the time. Apparently some residual vapor in the line leaked out while workers were removing a spacer in a pipe in order to insert a blank which would seal off the pipe and the equipment. Seven contract employees working on construction in the area experienced eye irritation. Two of these also reported nausea and were treated at in-plant medical facilitites. All seven returned to work for the rest of the day. Two of these workers sought treatment at the community hospital later that evening. They were examined and released without being admitted.
>
> There has been some national media attention paid to the MIC incident.

(2) The Rhone-Poulenc formal report on the February 2 incident

In Rhone-Poulenc's ''Notification of Serious Incident'' report that is dated February 27, 1990, the material circumstances of the incident on February 2, 1990, at 11:05 a.m. are in further part summarized:

> The bottom calandria flange spacer was removed and a blank inserted without difficulty. Difficulty was experienced, however, in removing the spacer in the top calandria flange. Maintenace then requested operations to reduce the vacuum to assist in removing the spacer. As this adjustment was made, vacuum was lost and vapors consisting of nitrogen with traces of MIC were released. On assessment of the release conditions, the Maintenance personnel evacuated the area and informed Operations. Operations turned in the local alarm and announced over the PA system the wind direction and instructions to clear the area. Operations immediately increased the system vacuum which stopped the release.

This report identified the causal factors as follows:

> *CAUSAL FACTORS*: (1) Vacuum was not maintained throughout initial break. Existing instrumentation (was) not sufficient to provide measurement in appropriate range for pressure monitoring. (2) Misalignment in equipment contributed to difficulty in removing spacer from top calandria flange. (3) Measures taken to clear immediate vicinity for initial break did not ensure that all personnel in area received communication of planned task nor did measures adequately prevent personnel from entering affected area.

(3) The prior reports to the public

On February 6, 1990, Plant Manager R. C. Bearer, who has publicly stated the incident was communicated to him at 10 p.m., Friday evening, following an investigation the following Monday, issued a public statement on the incident on February 6, 1990, reporting the facts of the incident as then known, which are basically the above. Only further notable are two Plant Manager Bearer's statements made publicly: (1) ''The problem occurred with our maintenance procedures while the unit was not in operation.'' (2) ''Upon investigation . . . I learned that, while the local alarm was communicated to Metro, no mention was made that nitrogen with a small amount of MIC was involved'' (R. Exh. 374, pp. 1, 3.) The ''Metro'' reference is to Metro Emergency Operations Center (R. Exh. 376).

The incident was subject of several newspaper reports starting February 6, 1990 (R. Exhs. 375–377) (and see C.P. Exh. 20). What would appear otherwise notable as bearing on reasonable evaluation of the union members and reference public citizen groups concerns about the environment and a potential MIC discharge in particular is the Times-West Virginian article of February 6, 1990 (R. Exh. 377) that (contrary to McCormick's recollection) reported on a 1985 leak (involving other substance), as follows:

> In August 1985, the Institute plant's agricultural products unit leaked aldicarb oxime and methylene chloride. More than 1,000 people sought treatment at an emergency shelter and 135 went to hospitals.

(4) The February 5, 1990 minutes of the executive and advisory board of the State Building Trades Council

The minutes read as follows:

> The Brown and Root report by Brother Thompson was discussed. According to OSHA reports Brown and Root has had 131 fatalities from 1975 through 1988.
>
> Due to the threat of Brown and Root spreading outside the Kanawha Valley and the enormous amount of time to conduct the campaign against Brown and Root, a motion was made, second [sic] and passed for Secretary Fisher and Charleston Building Trades Council Business manager, Thompson to pursue the possibility of hiring a full time person to coordinate the Brown and Root project and any other major non-union project in the state.

In the following minutes of March 27, 1990 (R. Exh. 363), it is recorded that Fisher introduced Thomas, a boilermaker, that the State Council had ''employed to work on the Brown and Root campaign.'' There followed the recording:

> Bill explained the activities and some of the goals of the campaign, he feels we have had a definite impact, such as keeping the public informed of Brown and Roots [sic] shoddy work and terrible safety record. The TV commercials and advertisements in the newspapers.
>
> Also, Brown and Root have been informed of our intent to organize.

(5) The increased picketing at the main gate on February 7, 1990

Pickets picketed in the morning and evening, as they had on January 31, 1990. Kilburn recounts that in times prior to this (i.e., apparently prior to January 31, 1990) pickets had come either in the morning or the evening. On February 7, picketing started at about 5 a.m. with 6 pickets, and grew to 20–30 until 9 a.m., when the number dropped back to 6 pickets, who stayed the day. In the afternoon the pickets grew in number to 40 pickets who stayed until 5 p.m. at which time all left. (To the extent Employer has contended that there was not an increase in the picketing after the above MIC leakage on February 2, 1990, that assertion is rejected as against weight of the clear and convincing evidence to the contrary.)

The hearse and camper were at the main gate. The picket cars were parked along the highway. There was a coffin and a skeleton positioned agaist Rhone-Poulenc's fence. A sign in use on this occasion (I find) said, ''*Support SAFE Boot Brown and Root.*'' Another sign on top of the skeleton stated, ''*Brown & Root victim*'' (below).

On what must be viewed as an initially simply leading testimony in regard to a claimed instance of the picketers taking credit for the removal of Shomo, Kilburn recounts, but initially not recalling the language that was used, that a sign in use at this time related to the pickets taking credit for the recent transfer of Shomo (whom Kilburn relates was promoted by Rhone-Poulenc to a position elsewhere), right around the first of February.

After a review of the signs that he had seen previously and recorded in his affidavit of May 25, 1990, Kilburn next related the sign he had referred to was ''Rudy Shomo, do you realize the circumstances?'' But Kilburn then retracted any firmness even in that recollection. In this instance I find that Kilburn's account on Shomo's departure reference wholly unpersuasive, and I shall not rely on any of it.

Kilburn otherwise testified that Bobby Thompson and Fisher were both at the main gate, and he observed that when pickets arrived, they would go up and talk to Thompson, and Thompson would direct them where to place the coffin and the skeleton and even where to position the people to stand along the roadway. Kilburn then recalls present on this occasion was not only Bobby Thompson and Fisher, but also Tommy Mormon, Tommy Thompson, Sutphin, and McCormick, stating McCormick was there purportedly in both the afternoon and evening picketing. Kilburn identifies the above (several times) on the video in evidence for even date (R. Exh. 107) except for contested presence of McCormick at the main gate. (Sutfin, sic, Sutphin, was also not identified on the videotape as there.)

Kilburn otherwise credibly recounts that morning Fisher, both Thompsons, and Mormon came into the plant entrance on Rhone-Poulenc property. This time, Kilburn instructed two supervisors to go out and ask them to leave. When asked

they (the four above last named) initially refused. Tommy Thompson responded, ''*[Y]ou don't keep your [MIC] gas on this side of the fence*, this is a public right of way and we have a right to be here.'' Within a few minutes, however, all four union personnel went out beyond the Rhone-Poulenc yellow property line in the gate roadway entrance and essentially stood along the road, east of the main gate entrance.

Kilburn confirmed that the ''gas'' reference was to the MIC gas leak they had had a few days before this (on February 2, 1990), and Kilburn acknowledged that all the people in the community were concerned about it. Though Kilburn has acknowledged it was announced that some Brown & Root employees were effected by MIC gas, he testified (I find accurately and see incident reports above) that it was *not* a result of their work, and that there was a public comment made by Rhone-Poulenc to that effect (later). Any additional Employer assertion that it was announced as being the fault of maintenance employees, however, rather than the referenced maintenance procedures is not credited.

Video (R. Exh. 107) at 06:59:49 that day confirms a sign then in use said, ''*SUPPORT SAFE, BOOT BROWN & ROOT.*'' Other signs in use that afternoon, near the coffin and/or skeleton, said, ''*Brown & Root victim.*'' Mormon was in the vicinity wearing a ''*Give the Boot to Brown & Root*'' T-shirt.

k. *Boilermakers Local 667's minutes of February 10, 1990*

The minutes of this meeting (R. Exh. 73) record of McCormick:

> He also reported on the Brown & Root situation at Rhone-Poulenc Institute. Since the recent M.I.C. leak at the plant the momentum has picked up in our favor. Bro. Bill Thomas has been hired full time to coordinate the organizing program for the Building Trades. Bro. Thomas is scheduled to make a presentation on Feb. 21 for SAFE at Institute. Rhone Poulenc people and the Concerned Citizens of Institute and surrounding areas are invited to attend. His presentation will explain in detail the type of training our Local Crafts must take to be considred journeymen in their field. He hopes to convince the Local Community that they would be much safer with skilled labor doing the work in Rhone Poulenc than Brown & Root.
>
> . . . .
>
> Bus. mgr. McCormick reported on the receipts and expenditures of SAFE since it begin [sic] coordinating the Brown & Root resistance campaign. He reminded the Body that when work picks up we will be soliciting additional voluntary contributions for SAFE. The members were also reminded that T Shirts were available with (Give The Boot To Brown & Root) silk screened on the front of the shirt.

l. *The Bill Thomas SAFE letter of February 12, 1990*

On February 12, 1990, Thomas sent a SAFE letter to all (Charleston Building Trades Council) affiliated unions, signing as coordinator. The letter (R. Exh. 1) provided in part as follows:

> As you may know the struggle for the safety of our communities and the future of our Union-skilled Craftsmen at Rhone-Poulenc has recently heated up.
>
> We at S.A.F.E. office have established a well organized campaign to inform the public of our concerns. Including Television Ads; Mail Outs; Telephone messages and Extensive Research into Brown and Roots [sic] work record. These things combined with the recent calamity in Rhone-Poulenc's MIC unit, where in seven (7) Brown and Root workers were injured, have proven that our cause is just.
>
> Those of you who have carried the fight to Rhone-Poulenc and Brown & Root are to be commended. It is not easy to sit in our camper hour after hour—day after day and watch out of state workers endanger the lives of the citizens of our valley. It is not easy to stand in the cold carrying a sign . . . . It is not easy to dig deep for a financial contribution when skeptics say it's a waste. But these things you have done and a lot, lot more.
>
> We at S.A.F.E. feel that now more than ever, we need to apply more pressure to Rhone-Poulenc. Public concern is rising and Brown and Root accidents are mounting. If you can make any type of contribution, time, money or ideas, please do so now.

m. *Picketing at the main gate on February 13, 1990*

On February 13, 1990, the camper and the hearse again arrived at the main gate. There were 10–15 pickets at the start. (At this time maintenance shift change started at about 6:45 a.m., and the oncoming shift started at 7:30 a.m. At about 7:45 a.m., they moved everything (camper, hearse, and pickets) to gate C, except three pickets who were left at the main gate). Kilburn identified Bobby Thompson and McCormick at one point standing at the main gate near the coffin and a skeleton. (R. Exh. 107, 2–13–90 7:09 a.m.)

n. *Picketing at the main gate on February 14, 1990*

The camper and hearse again arrive early at the main gate at 6 a.m. By afternoon pickets have increased to 65. Local news media interviewed Fisher at the main gate. Also present were Bobby Thompson and Mormon. Fisher holds a sign that says, ''*Remember we must live with their work.*''

The hearse and camper arrive at the main gate and remain there all day. Two pickets remain in the camper until the afternoon when by 4 p.m. the pickets number increases to 25–30. All the pickets then leave at 5 p.m., when they move down to gate C.

o. *Picketing at the main gate on February 21, 1990, and Thomas' presentment before CSA*

Blashford attended the CSA meeting held on February 21, 1990. Members and copied were the same, though those in attendance are not indicated on the exhibit in evidence. Blashford recalled that Bobby Thompson had been scheduled to speak on SAFE, but Thomas substituted. Blashford related that in Thomas' introduction, Thomas indicated that he was a member of the Boilermakers, and Thomas said that he was there representing Bobby Thompson, who is president of the Building and Costruction Trades. Employer has introduced in evidence a brief extract of that meeting (R. Exh. 164) which

confirms the latter, but not the former, as Thomas identified himself as a member of the Building Trades, though I do not overlook the likelihood he mentioned his own trade during the course of his discussion. (In contrast, Local 667 had reported to its members that Thomas' talk would be for SAFE.)

Norman has acknowledged that Brown & Root had taped this meeting through its hired public relations consultant. Norman explained that Thompson had been scheduled to give the talk, he was conducting the picketing against Brown & Root, and they wanted to know what Thompson would say. The printed agenda for the meeting of February 21, 1990, had compatibly listed its second item as (a discussion on the) ''SAFE Committee'' by ''Bobby Thompson, Co-chairperson SAFE'' (R. Exh. 162).

Norman has asserted that Thomas' talk was not on safety, but on why they should use union labor. Employer does not present the substance of Thomas' talk and, however, under all the circumstances, I am not persuaded of Norman's account without it. In contrast, Blashford testified Thomas talked about the training program for their apprentices, some of the safety training, and that he passed around some of the manuals and tests they (apprentices) are required to take. The minutes of the meeting essentially confirm Blashford, not Norman, and summarize pertinently:

> Bill's presentation explained who they are, what they are and why they exist. He emphasized safety is achieved through training and education, he then reviewed the individual trades apprenticeship and journeyman's training program. Also, the skills and safety training provided was highlighted in addition to what qualifications are required to get into the Building Trades Labor Pool. Mr. Thomas discussed how non-union construction organizations impact on the local community from a safety and economical aspect.

p. *Picketing, handbilling, and distributions at the main gate on March 28, 1990*

On March 28, 1990, picketing started at the main gate at 6 a.m. with 10–15 pickets. The pickets again reduced in number to two during the day (which Kilburn reports became the trend). In the afternoon hours on this day, pickets passed out letters, pins, and (*No Brown & Root*) decals to the Rhone-Poulenc employees as they entered the plant.

The decal (R. Exh. 114) passed out was the universal circled negative bar imposed on the name of Brown & Root. The pin or union button (R. Exh. 115) states, ''Charleston Building Trades organizing says . . . UNION YES (with checkmark in box)'' and West Virginia Labor Federation AFL–CIO and UFCW Union Chicago logos.

SAFE's letter to IAM members

The literature passed out on this occasion was a SAFE letter (R. Exh. 113) dated March 19, 1990, addressed ''OPEN LETTER TO MEMBERS OF IAM 656'' and signed by Thompson and Rev. Gilmer as cochairmen. It stated:

> SAFE is a broad based community organization composed of union members, church leaders, environmentalists, and area residents. SAFE was formed to oppose Rhone-Poulenc management's decision to subcontract Institute Plant Construction and maintenance work to Brown & Root USA, Inc. an agressive company with a long history of unsafe work practices.
>
> For over 10 years now, big corporations like . . . have been hammering contracts to lower wage costs, cut jobs, and raise profits. Under the guise of increasing productivity on-the-job safety falls among the first victims of this drive for fatter profits. Rhone-Poulenc is a leader in this effort among chemical companies in the Kanawha Valley. Of course, when on-the-job safety standards decline in chemical plants producing highly toxic chemicals entire communities are threatened.
>
> Contracting work at the Syn-Gas Unit, and the MIC release on February 2nd which injured seven (7) Brown & Root workers clearly indicate the dangerous course Rhone-Poulenc management is following.
>
> SAFE believes in the commitment to safe chemical operations and the experience of the operators and maintenance workers who are members of International Association of Machinist Local Lodge 656 (IAM LL 656) at the Institute Plant. Union members strongly committed to safety are the first line of defense in preserving safe working conditions and a clean environment. Workers without union training and protection are easy victims of arbitrary and unsafe management decisions.
>
> The problems at Rhone-Poulenc lie squarely with Rhone-Poulenc management—not with IAM LL 656 operators or maintenance workers. We believe that community residents and IAM members share a common interest in safe plant working conditions, and a healthy environment for surrounding communities, not just at Rhone-Poulenc, but at all valley chemical plants.
>
> SAFE's goal is to bring together plant workers and community residents to guarantee a safe and healthier Kanawha Valley.
>
> We invite you to join with us in this effort. Your ideas and participation will be warmly received. SAFE meets regularly each Thursday night at 7:00 p.m. at the Educational Building of the International Brotherhood of Electrical workers, 800 Indiana Avenue, Charleston, West Virginia.

q. *Boilermakers Local 667's minutes of April 14, 1990*

Local 667's minutes of April 14, 1989 (R. Exh. 75), record that:

> Bro. Bill Thomas reported on Safety & Fair Employment (S.A.F.E.). He informed the Body that the money donated by everyone is going to a good cause. All money is being spent on advertising, and expenses to operate the SAFE projects. No wages are being paid from this fund. He informed the body that the TV advertisements, and the other forms of advertising the unsafe record of Brown & Root is very expensive. He also spoke on the organizing campaign against Brown & Root at Institute.

r. *Picketing at the main gate on April 25, 1990*

On April 25, 1990, nine pickets arrived at 4:45 a.m. at the main gate, passed out literature (R. Exh. 116) to Rhone-Poulenc employees, and left at 7:15 a.m. This leaflet pub-

licized a rally on April 29, 1990, and invited attendance at a solidarity rally at the Teamsters building to support organizing drives. Pertinently it informed: ''*UNION CARBIDE CONSTRUCTION* workers are joining the International Association of Machinists. *RED CROSS* workers are joining the Hospital Workers. *WELDING INC.* workers are joining the Laborers and Operating Engineers union. *BROWN & ROOT* workers are joining the Charleston Building Trades.'' There was no further picketing at the main gate thereafter.

Before addressing the picketing development at gate C, on careful review of the above and related record, it is presently concluded and found that *there is no convincing evidence presented of independent 8(b)(1)(A) type misconduct (e.g., gate blockage, throwing of cheese or other items at or other damage to vehicles, yelling or obscene threats, or calling employees scabs, by any one at the main gate,* let alone claimed done so by any Boilermakers officials, or individuals wearing Boilermakers jackets, let alone named applicants, in any of the claimed Building Trades and Boilermakers picketing at the main gate.

To the contrary, Kilburn essentially acknowledged of the claimed picketing at the main gate: the pickets stood at the sides of the gates with signs in their hands; they handed out the above literature to the vehicles entering and exiting Rhone-Poulenc's main gate as well as to the general public on the northside of Route 25 there, and the pickets did not patrol in front of the main gate, they did not march across the front gate. Accordingly, I conclude and find that there is no evidence presented of any 8(b)(1)(A)-type conduct raised in defense to be found in the demonstrations/picketing conducted at Rhone-Poulenc's main gate, not through September 25 or October 18, 1989, or ever. It follows with regard to any named applicant who has at any point participated in a demonstration/picketing at the Rhone-Poulenc main gate, the Employer's defense is limited to claims of discriminatee-applicant's engagement in illegal secondary (and seemingly not 8(b)(7)(C)) picketing there.

4. Picket line conduct at Brown & Root's gate C during September 1989; through October 18, 1989; and certain related events

Employer would distinguish Brown & Root opposed hiring unlawful picketers and self-declared agents of unions involved in (unlawful) picketing, as long as that picketing was still underway. It centrally argues the General Counsel (and the Union) can not show Brown & Root's reason for refusing to hire the organizer-applicants (namely for their unlawful secondary picketing activity and self-declared support for it) was pretextual, since the misconduct and self-declared support in fact occurred. The fact, however, is Employer had not identified any named Boilermaker applicant in the above claimed misconduct at time it decided not to consider, or hire applicants who declared on their applications they were Boilermaker Local 667 volunteer union organizers, or words to that effect.

Harold Norman, Brown & Root's corporate investigator, who has testified substantially on subsequent picketing, did not arrive until October 9, 1989. Thorn testified as to picketing at Brown & Root's gate before then. Brown & Root has employed James D. Thorn off-and-on since 1977, materially last as its safety supervisor at the Rhone-Poulenc job at Institute. Thorn's duties there, in addition to safety, included health, medical, and security. In regard to safety, Thorn was responsible (with staff) for interpreting all Federal and state rules and regulations, and, he was responsible for implementing safety, medical, and health training programs, including accident medical followup, and industrial hygiene monitoring.

Thorn has had broad experience in Brown & Root operations. Thorn has two certificates as an asbestos supervisor contractor; two certificates in hazardous waste operations (commonly known as HAZWOP). He is certified through national registry of emergency medical technicians as an EMT; and Thorn is licensed by the state of West Virginia as an EMT. He has attended OSHA school for supervisors, which is a training program put on by the Department of Labor. He has attended Brown and Root's own construction supervisor course; and, Thorn testified that he had received quite a bit of plant training from different clients, which covered various aspects of safety and emergency response. Thorn has also received certification in programs involving self-contained breathing apparatus from Union Carbide Corporation in Taft, Louisiana; and, he has been certified as a trainer therein by Rhone-Poulenc here in West Virginia, as well as having received such training in other environmental resource management, through hazardous waste operations training, and through asbestos supervisor training. He is currently attending classes at West Virginia Tech University to receive a paramedic license.

Thorn is Brown and Root's representative to the Kanawha Valley Emergency Preparedness Council (KWEPC) and he also works with the State Chapter of the Associated Builders and Contractors (ABC) helping some of their companies in the area to formulate their own safety and health programs. KWEPC is a group composed of emergency medical systems; fire and police departments; EMS squads, and emergency response squads from various plants in the area. Basically, KWEPC coordinates for disaster relief, education, drilling, and preparedness. They get together once a month to have a meeting and they also conduct drills, which they run about twice a month. Though Thorn acknowledged there are some months when they do not meet, generally there are two meetings held a month. They have (train on handling) mock disasters, and then critique the effort. On (Brown & Root's) staff he has a licensed practical nurse (LPN) who is also an emergency medical technician (EMT). He has two other EMTs, who are journeymen craftsmen, and who serve in the field, on need, as field inspectors.

Thorn's security duties include security of: the office complex; various toolrooms that are scattered around the plant; any rolling stock equipment (i.e., fork lifts, cherry pickers, etc.). Thorn is also responsible for the parking lot area to insure that the employees vehicles are okay while they are working; and, he is responsible for monitoring the gate.

Brown & Root's safety supervisor, Thorn, testified that during the week of September 17, 1989, he had called and listened to a Communication Workers of America (CWA) hotline. Thorn described it as a phone number that you call into to get information about the different activities about the Union. Transcript of the message he heard is in evidence as Respondent's Exhibit 165. The message stated:

> [Unintelligible]. Here in the Kanawha Valley we are faced with a danger to our health, our community and

> our jobs. Rhone-Poulenc, formerly Carbide, has just hired a contractor out of Texas to replace our West Virginia construction workers, who live here and pay taxes here. The Texas contractors have a long history of bad workmanship—the most recent on the Comanche Peak Nuclear Power Plant, where they performed extensive faulty welding on pipes designed to carry radioactive liquids to a reactor. $40,000,000 worth of condensers were damaged when workers sledgehammered tubes into place and protective coatings were deemed to be useless because of bad workmanship, along with 200 electrical installations, because seals were unacceptable. With the hazard that chemical companies present today and the company's blatant disregard for workers as well as people who live in nearby communities, we as West Virginians and citizens must now take a stand and be concerned with our own safety, our health and our jobs. Help us fight for you. Make a note of the following dates for activities. On Thursday, September 21 at 4:00 p.m., we need volunteers to meet at the Dunbar Recreation Center located on Route 25. It's the road that runs along I-64. The purpose is to pass out handbills in the Institute, Dunbar and West Dunbar areas. Also there will be a mass rally on Friday, September 22, beginning at 3:30 p.m. in front of the Rhone-Poulenc plant just off of I-64 at Institute. There will be a mass meeting this Sunday, September 24, at 3:00 p.m. at the Teamsters Hall in Kanawha City. From there we will caravan to the Capital. On Monday morning, September 25, at 6:00 a.m., there will be a mass rally at the Rhone-Poulenc plant. You may also telephone 747–6422 to voice your displeasure with the hiring of a Texas contractor. Should you be asked if you are affiliated with a union, remember our concern is not just union, it's our health and safety. This has been Elaine Harris, a concerned citizen. Thank you.

It was stipulated that the number provided was Rhone-Poulenc's phone number. Bonnie Blashford, presently director of communications for Rhone-Poulenc at Institute, but in material times since 1988 employed as a public affairs specialist for Rhone-Poulenc, confirmed the above number was Rhone-Poulenc's phone number.

Within a few days, because of the number of calls received, Blashford set up an answering machine with an outgoing message, which also allowed callers to leave a message. Thus, Rhone-Poulenc had early effectively developed its own hotline, which provided answering machine message re Brown & Root as follows:

> This is Rhone-Poulenc AG Company's information hotline. Today's message concerns the plant's new construction contractor.
>
> Brown & Root was selected by competitive bid for capital construction work at the Institute Plant, including construction of new units, as well as remodeling and updating existing units. This kind of work was previously performed by several separate contractors, including the non-union Union Carbide construction crew.
>
> Brown & Root has a policy of hiring locally. Applications will be accepted at the West Virginia State Employment Service offices.
>
> Brown & Root was selected based on their years of experience, their outstanding reputation in the chemical construction industry, their commitment to safety, and their competitive costs.
>
> This move is part of Rhone-Poulenc's continuing efforts to make the Institute Plant more efficient. As we improve the plant's ability to compete for new or expanded units, we enhance the long-term prospects for plant and worker security.
>
> For more information on Brown & Root, contact Joe Stevens at (713) 676–4727. To leave a message for Rhone-Poulenc, please leave your name and phone number after the beep. Thank you.

The circumstances generating this message were: Blashford recounts that beginning about September 18 or 19, 1989, and for about 2 months thereafter, Blashford received calls from people who identiufied themselves as concerned citizens, and (candidly) some as Rhone-Poulenc employees. In general, they didn't like Brown & Root working at the Institute Plant. Blashford describes the messages she received as essentially threefold: some referred to Brown & Root's alleged poor safety record, referring to literature they got at the front gate, or that they were given second hand; some were concerned that Brown & Root employees would be displacing West Virginia workers; and, some were concerned because Brown & Root was a nonunion contractor. Most of the calls that she received came to Rhone-Poulenc's central phone number 747–6000, shared with, and operated by Carbide. In some cases, Carbide operators took names and phone numbers of callers and had passed that (information) on to Blashford who returned the calls. Some calls were passed on directly to Blashford's office.

Employer established through certain of Blashford's notes that of those calling in to the central operator in the first week, i.e., whose names *and* phone numbers were supplied and passed on to Blashford for a return call, were: McCormick, Thomas, and one of the named applicants, Garrett Walker (R. Exh. 154; Tr 4297–98). Blashford testified, between September and November 1989 she had received and returned calls to several dozen callers. Though she didn't always note the return call conversations, especially at first, she could testify at least generally that some of them had urged Rhone-Poulenc to break the contract with Brown & Root; and, some had said that Brown & Root should not be working at Institute.

Blashford, however, even with her other notes of conversations that she had held (R. Exh. 156, 157), has testified she could not identify any specific individual that had said they wanted Rhone-Poulenc to break the contract with Brown & Root. The only apparent references in her additional notes to named applicants are to Joe Asbury and Dan Dougherty.

Notes on Asbury referred to the pamphlets, to MIC unit, and as Blashford cryptically noted ''—got cut off during local hiring comment'' (R. Exh. 156, p. 1). The only other apparent named applicant was Dan Darty (sic) who has the same telephone number (R. Exh. 156, p. 3) as Daniel Dougherty (R. Exh. 157, p. 4). The first Darty (sic) note, records: ''He feels there is great problem with B & R safety record—he put in appl. with them and they said they would hire some here & bring some here—He lives here, works here & spends his money here.'' Later Dougherty note, in addition

to Blashford's noting Dougherty had said his daughter is a student at a named local school, also recorded that he ''says that 'Dupont buys their safety record & I suspect you all do the same thing.''' I only additionally observe that a note made of conversation with Keith Andrews (not a named applicant) is (Brown & Root) ''have done a few good jobs, but they cut corners—afraid that will happen here.''

a. *Picketing at Brown & Root gate on September 18–27, 1989*

There was no protest/picketing at Brown & Root's gate C on September 17, 1989. The first such picketing at Brown & Root's gate occured on September 18, 1989. Thorn was prone to testify conclusionarily; and, I have evaluated accordingly. Thorn has asserted that there was picketing at all the contractor gates on September 18. I find handbilling more likely. I, however, do credit Thorn's testimony that he observed McCormick, Fisher, and Tommy Thompson at gate C supported as it is by Respondent's Exhibit 166. While I also credit Thorn that another picture (R. Exh. 167) was taken of individuals near gate A, I do not find that additional photgraph taken of certain individuals as persuasive that there was picketing at gate A (nonunion contractors gate). No video excerpts were offered in support of picketing at gate A or B in this period. Though there are three individuals appearing out in the road on the west corner of gate A, none have signs, nor do the two further west. Another individul is shown across the road resting against a car. Indeed the only individual that appears with any paper in hand appears clearly to be coming from gate C.

Thorn similarly testified that there was picketing at gate C for about an-hour-and-a-half on September 25 and 27 in the morning (and in the afternoon on 29, 1989). According to Thorn, he saw some pickets were carrying signs, and they were passing out flyers. On either September 25 or 27, he heard pickets shout obscenities, and he saw them write down license tag nunmbers. Thorn has testified generally that Bobby Thompson passed out and collected signs; and he directed personnel around. Signs in use said, Brown & Root Scabs Go Home; Tell Rhone-Poulenc We Need Safety Not Brown & Root; Brown & Root Go Home; and, Rudy Shomo lies.

The first picketing, however, that Employer relies upon at gate C is on September 29, with McCormick present (but thus 4 days after Pribyl had made his decision not to hire, and not to consider for hire any of the discriminatee-applicants). Employer contends: (1) there was mass picketing on that date; (2) the pickets blocked exiting vehicles; (3) they called out license plate numbers of Brown & Root emloyees; and (4) Fisher was there videotaping a picket with a sign that said, ''Send Brown & Root packing.''

Thorn identified Bobby Thompson, Fisherl, and McCormick as present September 29, 1989. They had a picket dressed up as a big rat, that was at gate A and then gate C. Thorn confirmed the rat is a symbol that is used by the Unions to denote nonunion contractors and nonunion workers. Fisher video taped employees leaving in the afternoon, while certain pickets had yelled at Brown & Root employees that they had their license plate numbers. The pickets also began using slow walking in front of a car as it was trying to pull out to hold them up. Contrary, however, to assertion of Thorn or Employer that Fisher was engaged in picketing gate A I find that video tape of these particulars shows Fisher arguably video taping the gate locations, but then clearly when finished directing other pickets and a picket in a costume of a rat to gate C (R. Exh. 120, 9–29–89, 3:24 through 3:26). McCormick is identified as present at 3:26:46. One sign in use at 3:27:02 said, ''Send Brown & Root packing.'' Another sign at 4:32:23 states ''Brown & Root Go Home.'' Fisher does point the video recorder as if taping license plates. Another picket with a pad of paper writes down license numbers. From 4:29:20 through 4:32:33 Fisher blocked a vehicle from leaving. Another vehicle is blocked by another picket for 4:57 through 5.

b. *Picketing at Brown & Root gate on October 2, 1989*

Employer contended: McCormick is present with a man in a boilermakers jacket among pickets spread out between gates C and (next gate) A. The signs in use at this gate include, *''Rhone Poulenc has safety, that's a lie.''* Employer contended that on this day McCormick held a sign that says, *''Send Brown & Root packing''* (Tr. 4412–13, 4421; R. Exh. 120, 10/2/89, 7:19–31).

Thorn testified that at about 6:10 a.m. on October 2 there were about 16 pickets spread out between gates C and A (the next gate proceeding east from gate C; and, that by 6:30 a.m. the pickets grew to about 28, but he states that they were then at gate C. Thorn testifed that (as before) the pickets use slow walk tactics, i.e., they would walk in front of cars and really slow up exits and entries. (Actually, even with the early morning darkness, any delay is to be measured in seconds, and far more momentary compared with the 2–3 minutes of delay in prior day.) Thorn otherwise testified that obscenities were spoken by the pickets to Brown & Root employees as they were being slowed in driving in; and, the pickets wrote down license plates as the Brown & Root employees drove in. From notes, Thorn then identified Bobby Thompson, Fisher, and McCormick was in the picketing, but on cross-examination Thorn could not identify McCormick as on the picket line at material time of any of the above incidents occuring during 6:39 to 6:46 a.m; nor can I. The following colloquy then occurred:

> JUDGE ROMANO: Excuse me, counsel, I'm going to pursue this. Have you effectively told me that on the occasion when these incidents the statements that you brought and drew to my attention, that you're not saying that Mr. McCormick was there?
>
> THE WITNESS: (No audible response.)
>
> JUDGE ROMANO: You're not testifying that he was there?
>
> THE WITNESS: Not at this point, no.

Thorn asserts, one sign in use said, *''Keep Brown & Root out of Institute''* and was carried by Fisher at gate C at 7:24 a.m.; and, that is corroborated on video tape at 7:24:08. Thorn asserts and video confirms at 7:29:37 a.m. that McCormick was standing just to the left, carrying a sign that said, *''Send Brown, Root packing''* and that McCormick's sign had a picture of a rat who was wearing a cowboy hat and carrying a suitcase. Another sign used said, *''Rhone-Poulenc has safety, that's a lie.''*

Thorn testified that at 7:31 a.m., on a Bobby Thompson hand signal, the pickets began to break up and leave. Then,

Thompson, Fisher, and McCormick began to collect the signs. At 7:35 a.m., present are Thompson, McCormick, and (Thorn believed) Thomas. Contrary to Thorn assertion, however, I am not persuaded and I do not find that Fisher and McCormick were on this occasion picketing at gate A. It is clear that shortly after that the picketing at gate C is ended.

Thorn's account and related pictures (R. Exhs. 168 and 169) do not persuade me that there was any union picketing of gate A on these occasions. There was a dearth of clear, and continuous video tape evidence sufficient to show actual picketing of gate A transpired on this occasion, or that picketing messages were actively being directed at individuals entering and exiting gate A on this day.

c. *Picketing at Brown & Root gate on October 4, 1989*

Employer relies on assertion that on October 4, 1989, McCormick is among approximately 50 pickets at gate C on the morning that Pribyl and James Thorn are blocked from entering the gate; and, that pickets throw egg at Pribyl's car (Tr. 4429–33; R. Exh. 120, 10/4/89, 7:11–7:14). Employer contends a pamphlet is distributed on this date which unlawfully implies that dispute is with Rhone-Poulenc and urges readers to call Rhone-Poulenc and tell it not to do business with Brown & Root (Tr. 4433–34; R. Exh. 110).

Thorn testified that at about 5:58 a.m. there were pickets at gates C and A. Bobby Thompson and Fisher were there. Thorn testified this time that vehicles were blocked at gates C and A for up to 10 minutes at a time, by various pickets slow walking tactics. Thorn testified that at approximately 6:15 a.m. he had made his first attempt to enter; and, he could not; so he went to the staging area. At about 6:30 a.m. Thorn made his second attempt. Videotape shows a car blocked at gate C at 6:32:45 a.m., and at 6:57:30 a.m., though apparently Thorn was not there (at least) the latter time. During the period between 6:30 and 7:10 a.m., he was with Brown & Root employees at the staging area, behind Krogers in Dunbar, about 4 miles away from the plant.

In regard to his second attempt, Thorn relates Pribyl told Thorn to follow him; that they were going to try to get back in. When they could not get in, Pribyl gestured Thorn to back up, he did. Thorn observed (confirmed) as Pribyl began backing up, one of the pickets threw an egg and hit Pribyl's car. As they left, Thorn saw Thompson and Fisher shaking hands. They went (back) to the staging area. Then about 7:10 a.m. he made another and third attempt to get in. This time he did. When he arrived at 7:10 a.m. there were approximately 50 pickets, standing at gate C blocking the employees, causing delays of about 10 minutes for each of the vehicles trying to get in. This time state police directed pickets out of the way; and the vehicles were able to pass.

Thorn testified that the 10-page ''Danger pamphlet'' (R. Exh. 110) was passed out that day. He also testified that pickets also stuck stickers on employee vehicles, including putting a merit shop, red circled Fight Back (with negative bar) sticker (R. Exh. 89) on Thorn's outside rear view mirror of his truck as he came through gate C. Again Thorn testified (generally) there were pickets at gate A. At the end of the picketing, Thompson (again) gathered up all picket signs. Thorn recalled that at this time they were pretty much working a 7-day workweek.

On supplied video tape (R. Exh. 120), Thorn has identified Bobby Thompson talking to the pickets at 7:11 a.m.; and Fisher there at 7:12 a.m. He asserts McCormick was also there; and, that Fisher walked over to him at 7:14 a.m. On the video at 7:14:12–13 a.m. McCormick is not as readily identifiable, but description appears plausible; and, it appears McCormick has not countered Thorn testimony that he was there at that time. I find that McCormick was present.

But also present that morning and thus in charge is (are) Bobby Thompson (and Fisher). At 7:14 a.m. the pickets extend from west of gate C to east of gate C. On this occasion, with cars parked between gate C east and gate A west, there is a group, standing at the west corner of gate A. A very large sign is in use that day that says, ''We live and breathe here.''

d. *Picketing at Brown & Root gate on October 5, 1989*

Employer relies on Thorn's assertion that on October 5, 1989, Jim McCormick is wearing a boilermakers jacket and is among pickets surrounding and blocking vehicles entering gate C. Presumably to show McCormick was in charge, the Employer asserts that on this day it was McCormick who collected signs from the pickets when the picketing concluded (Tr. 4451–4452; R. Exh. 120, 10/5/89, 7:11–7:23).

Thorn testified that on this day the pickets numbered 60 by about 6:10 a.m. They pounded and kicked vehicles entering gate C and blocked out vehicles approximately 15 minutes at a time. Fisher and McCormick were present that day. McCormick collected the signs up by 7:40 a.m. The state police had to intervene to move pickets to allow Brown & Root vehicles to enter. A number of the employees' vehicles were damaged and had dents, scratches, and tags bent. Again some pickets were at gate A. There are obscenities. A car is blocked (and/or at least the driver's vision is) from 7:07:30 to 7:20:37 a.m., thus for 13 minutes, during which period Fisher and McCormick are present 7:16:29 to 7:23 a.m.. The license tag is bent. McCormick collects signs.

e. *Picketing at Brown & Root gate on October 6, 1989*

Thorn testified that there was no picketing in the morning, but 50 pickets were present by 3:50 p.m. and they dispersed by 4:30 p.m. A sign in use said, ''Send Brown & Root packing'' (R. Exh. 171; Tr. 4454). But Thorn did not know the identity of the person holding the sign, though Thompson was in the picture.

f. *The Sunday Gazette-Mail summary report of October 8, 1989*

As early as October 8, 1989, a news article (R. Exh. 171) in the local Gazette-Mail (Sunday) newspaper reported broadly to the local community on the positions of the various contending forces. Thus it reported on: (1) Brown & Root's (rebounding) size, as then employing 32,000 directly, and 20,000 more through its various joint-venture companies; and, that it ''specializes in building chemical plants and petro-chemical refineries.'' (2) Critic charges that Brown & Root has poorly trained workers who do shoddy work with supporting references to: (a) its problems at two nuclear power plants, and with relation of it presently working ''inside a complex that produces deadly chemicals, including methyl isocyanate (MIC) that killed thousands in Bhopal, India.'' (b) a $1 million fine it had paid after the U.S. Government's Department of Justice had charged it rigged cer-

tain bids; and (c) the building of a refinery for Gadhafi in Libya. (3) Brown & Root Stevens' response, that Brown and Root has a ''very strong emphasis on safety'' and ''Compared to the national average, we are very far ahead. . . . We can point to plant after plant where we have an outstanding safety record.''

The article continues with: (4) Shomo's support of Brown & Root's ''great reputation for quality work'' with two cited examples of it working millions of hours, and 14 years, without lost-time injury (at a Dupont plant in Waynesboro, Virginia), or lost-time accident (in Chevron plant in Pascagoula, Miss.), with stated report, that Shomo also believes it is becoming too costly to hire union contractors. (5) The spokesman of the Kanawha Valley Contractors Association (KVCA) contrary view then stated, Shomo is an antiunion ideologue who hates the Unions on principle. (6) Bobby Thompson's assertions that the Charleston Building Trades have reduced area construction costs 35 percent in recent years; and, that a plant that Rhone-Poulenc could have built locally for $90 million, that it had decided to build in Louisiana, will cost $135 million.

Stevens' local employment assertion (7) that since the day Brown & Root began, it had worked with the local Job Service; that it had received 200 applications; and that it had hired 20 of them out of its 36 that were then employed (none of whom as shown above were Boilermaker skilled applicants). (8) KVCA spokesman's contrary assertion its bad business to hire construction workers straight off the unemployment line, with contrasting assertions that its companies hire trained, skilled workers, ''who have gone through long apprenticeship programs, OSHA . . . programs, other programs . . . . The employment office has people who are not highly trained.''

The article reports: (9) Rev. Gilmer's statement as cochairman of SAFE, ''I am concerned about the safety of the entire area. You can't compromise with that. The safety record of Brown & root is less than satisfactory.'' (11) The pamphlet specific charges, that are summarized elsewhere herein. (12) Stevens' response that an unfair and distorted picture is being painted, with Stevens' counter assertions: one nuclear plant is on line, and, Brown & Root left that job because the electric company changed its engineers; the other nuclear plant is finishing up, and will be on line; the bid rigging case didn't have a whole lot to do with this particular case; and, Brown & Root intends to be a good corporate citizen in the Valley. (13) KVCA spokesman's counter assertions: (a) ''It is dangerous to take kids from the employment office to work at one of the most dangerous chemical plants in the world. You can't say that is good community service.'' (b) ''There could have been a lot of our people working down there. I know a lot of guys who are laid off, middle-aged men who are really skilled people.'' (14) The view of an identified analyst of the chemical production and transport (industry) from an Environmental Policy Institute in Wahington was quoted in general manner supportive of unions from ''environmentalist and community perspective.''

g. *Picketing at Brown & Root gate on October 9, 1989*

In brief Respondent essentially contends McCormick and Thomas are among those arrested at gate C for blocking traffic (Tr. 188, 3727, 3730, 3897; R. Exh. 107, 10/9/89, 7:15–7:20; R. Exh. 121). Rhone-Poulenc Security Administrator Marcus Kilburn knew McCormick and Thomas and identified them for Brown & Root (Tr. 3874–3876, 3897).

Kilburn testified that on October 9, 1989, there were about 60 pickets at gate C. (Thorn testified that he counted 70 pickets twice.) The pickets just totally blocked Brown & Root's gate C; and, this time they refused to move. Kilburn has correctly summarized that since October 4 or 5, picketing at gate C had become more agressive than pickets holding signs and passing out literature. It had then turned to pickets slow down of cars entering the plant by pickets walking slowly across the road, then blocking the cars, with pickets spitting on cars and yelling as Brown & Root employees would enter the plant. On the mornings previous to October 9, 1989, however, pickets would allow the vehicles in, after holding them up for a certain length of time.

Norman related that there were approximately 75 pickets by 6:30 a.m. at gate C. At this time Brown & Root's hours were from 7:30 a.m. to 4 p.m. (Brown & Root's hours were changed on October 23, 1989, to 7 a.m. to 5:30 p.m., for stated efficiency, and rain makeup purposes.) Norman relates that Brown & Root employees tried to enter shortly before 7:30 a.m. and they were denied entry. When the pickets did not move for West Virginia state police when called, the state police then arrested 36 pickets and cleared the gate.

Kilburn related that on October 9, 1989, gate C was blocked from 5:48 to 7:20 a.m. Kilburn related that Pribyl (and another supervisor) was in the first car stopped that morning. At about 07:25 a.m. the West Virginia State Police arrived, and asked the pickets to move; the state police vans arrived at 7:27:32 a.m.; and, the state police then started arresting the pickets (who at this time had sat down in the road) for refusing to move; and the gate was then eventually in that manner opened at 7:38 a.m. According to Kilburn, some 35–40 people were arrested for sitting down in the road at gate C.

Arrested that day were: Bobby Thompson; Fisher; McCormick; Joe Powell, a president of an AFL–CIO chapter; Robert Sutphin, secretary, Carpenter's Local 1207; Tommy Thompson; and Thomas. Kilburn testified he was able to identify some of them from the questions he had asked of employees. Kilburn knew Bobby Thompson as business manager of Charleston Building Trades Council from before. Kilburn also knew Bobby Thompson as the cochair of SAFE. Apart from Thomas, no named applicant was arrested. Newscast of the incident presented as claim of those arrested that no harm was done as the Rhone-Poulenc plant was shut down that day for the holiday (R. Exh. 122). The harm done was to Brown & Root's operations.

In regard to the identification of Thomas on the picket line, on cross-examination, Kilburn acknowledged that over some period of time he had asked Rhone-Poulenc employees to find out which of the individuals were union affiliates. Kilburn affirmed that he would call them in the offce, and ask the employee if this person is affiliated with any union. Kilburn affirmed that in a number of instances they said no. He was, however, able to identify some, and probably Thomas in that manner. Kilburn gave the names of a number of individuals that he was in that manner able to determine to Brown & Root, along with information on a list of names that he ran through a highway license resource. *In that regard Kilburn recounted he had checked the license plates of 20 percent of the pickets, or about 50–60 individuals. The*

only ones that they were really interested in were the apparent picket line leaders; and, someone that he thought had some role in picketing activity, i.e., ones who created a disturbance like blocking a gate; spinning their tires, and driving too fast; endangering people; or parking (illegally).

After the arrests a question came up as to whether there had been a lawful arrest. Kilburn testified as to a conversation he had with the state police, in which the state police told Kilburn that if they consider this to be a labor dispute, they will not arrest for trespass on private property, as that is a matter governed by state law definition of trespass, that excepts labor dispute trespass. Apparently in a conversation the next day, a state police sergeant informed Kilburn (for reasons Kilburn asserts he did not wholly understand) it was then viewed a labor dispute.

Questions were raised about the (property) space between the extension of State property line from the highway's centerline south, and Rhone-Poulenc's property line. The issue arose (essentially) over the space existing between demarkation lines of private (then viewed as set out by the chain link fence line) and public property (the measured berm line from road center line). Kilburn's understanding was, if pickets were not on the State's right of way, but on Rhone-Poulenc's property, and if, as they determined it was in a labor dispute, then it would be up to Rhone-Poulenc to remove (blocking) pickets, or to sign warrants for trespass.

h. *Picketing at Brown & Root gate on October 10, 1989*

Although Employer in brief does not rely on incidents of October 10 (or 11, next), 1989, Kilburn related from about 6 to 9:20 a.m. on October 10, 1989, the Brown & Root gate C was again totally blocked by pickets. The state police were there again, but they did not arrest the pickets.

Harold Norman, Brown & Root's security investigator testified that there were about 75 pickets there by 7 a.m. Norman confirmed that Pribyl and Al Hill, another Brown & Root supervisor (each) tried to enter the Brown & Root gate C at 6:30 a.m., and were blocked for some 2 hours by the massed pickets and, that they were unable to gain entry into the plant during that period. Norman (and Paul Beisenherz, assistant dircetor of corporate security for Brown & Root), called the state police for assistance; and, Norman was told they now considered the matter a labor dispute; and, they would not come on private property during a labor dispute to clear right of way. (As requested, I take judicial notice of the supporting West Virginia statutory provision (R. Exh. 123, § 61–3B-3 (d), Trespass on property other than structure or conveyance).)

Norman also testified that other Brown & Root employees, who had been staged elsewhere, were directed by him to come to the jobsite and attempt to enter. They did at 7:45 a.m., were unable to (at that time); and, they were directed by the state police (under the circumstances) not to attempt to enter, but to drive on. Later at 8:49 a.m. a pickup truck is similarly stopped and Fisher is identified as present and who approached to converse with the truck.

Kilburn and Jim Lake, Rhone-Poulenc human relations manager, determined that the disputed property was owned by Rhone-Poulenc and they met with Norman, at the Brown & Root trailer that day. Kilburn said he felt they needed to make it clear to the pickets that it was Rhone-Poulenc's property; and, the pickets were on it, even though it was Brown & Root's gate C; and, that we (Rhone-Poulenc) had no problem with their holding signs or passing out literature there, but we didn't want gate C blocked. Norman testified they discussed that if they notified the pickets that they were trespassing that they might quit blocking the gate. After talking to Norman, Lake went out to talk to the pickets and Kilburn followed. Kilburn (and Norman) relate Bobby Thompson (and Fisher) came foreward to talk. Lake and Thompson then spoke at 8:57 a.m.

Lake explained it was Brown & Root's gate, but it was Rhone-Poulenc's property; and they did not want it (the roadway entrance) blocked. Thompson replied that the state highway right of way came only so far; there was a little space of ground there that he didn't think belonged to anybody; it was ''no man's land;'' that they had a right to stand there, and they were going to stand there. Lake and Kilburn left. (On further review, the Company confirmed it was their property. The explanation was they had built their chain link fence bordering their property, 8 feet back from Rhone-Poulenc's actual property line. Kilburn testified that there was no easement involved.) About 20 minutes later the pickets cleared the gate; and, Brown & Root employees were able to enter at 9:30 a.m. There is no evidence to indicate that McCormick was present on this occasion; or that Boilermakers Local 667 members were involved; nor that any named applicant participated in the picketing of October 10, 1989.

i. *Picketing at Brown & Root gate on October 11, 1989*

On the afternoon of October 11, 1989, Lake and Kilburn (and Rhone-Poulenc Assistant Plant Manager Warren Woomer) continued a discussion about Rhone-Poulenc's property line with Allen Fisher, Robert Sutfin (sic, Carpenters Local 1207 Sutphin) and Building Trades attorney Pat Marony. Present was Sergeant S. W. Booth for West Virginia State Police, who had called for the meeting. There were two other individuals present from the State Department of Highways.

The subject of the conversation was a carry over from the prior day, namely where the property lines were. It was established that Rhone-Poulenc's property line began 62 feet from the centerline of the highway. Marony observed that there was some doubt remaining in his mind, that there still wasn't some space between the lines. The highway people, however, said their line joined Rhone-Poulenc's property line, there was no area in between; and, that is what would be enforced. Sergeant Booth then said they would enforce the area 62 feet from centerline of Route 25, but beyond that was Rhone-Poulenc property, and they would not enforce trespass there, because (in their view) there was a labor dispute. (Kilburn testified that Lieutenant Colonel George Young of the West Virginia State Police confirmed it to Kilburn in a conversation they had later that day.) Video tape (R. Exh. 107, 10–11–89 does not show any pickets on October 11, 1989, blocking gate C at any time. Norman confirmed there was not. The only people at any time in the road are the named participants in the conversations described.

As a consequence of these conversations, however, that very night, Rhone-Poulenc constructed a second fence 8 feet out on the end of their property line; and painted a yellow

roadway line in the gate entrance, right on their property line, so that there would be no question where their property line was. Gate C's (and apparently A's) roadway line was moved up. Kilburn acknowledged the pickets thereafter stayed on public property, but Kilburn has asserted there were some additional instances of where gate C was blocked (though he did not testify as to them). Rhone-Poulenc instructed Brown & Root that any request made of the state police with regard to a blocking of gate C was to be taken by them.

On the same day, Norman called the CWA hotline which played the following (stipulated) recorded message to callers:

> [Unintelligible] CWA members regarding contract ratification and safety alert October 11th.
>
> The results of the contract ratification vote will be announced on Monday, October 16th. Help us protect the Kanawha Valley. [Unintelligible] must insist that Rhone Poulenc get rid of Brown & Root contractors. There is great danger to our health, community and jobs. Are you aware that on September 13th Rhone Poulenc contract construction workers were told to go home? Who got their jobs? Brown & Root contractors did. You ask what's wrong with people coming here? Nothing at all if West Virginia didn't have one of the highest unemployment rates in the nation. Do you want to trust a contractor like Brown & Root, with their track record, in a plant handling MIC? We don't. Our people are trained, skilled workers who have an established safety record and are concerned with the safety and health of the community because they live here. Help us protect the Kanawha Valley.
>
> We will continue to have mass rallies at the Rhone-Poulenc plant just off I-64 at Institute. For further information contact your local union officers or your organization's group leader.

j. *Picketing at Brown & Root gate on October 12, 1989*

Employer relies on contention that on October 12, 1989, Pribyl's car was blocked by pickets, including McCormick in a Boilermakers jacket, Thomas and another picket in a Boilermakers jacket. Norman identifies a man resembling Thomas (R. Exh. 119 at 10/12/89 7:41:10 a.m.) as with others standing in the center of gate C (Tr. 4035); and MCCormick as there at 7:45:41 a.m.

Norman testified that by 7 a.m., there were about 125 pickets present at Brown & Root's gate. When Pribyl attempted to enter at 7:22 a.m., a white object was thrown up in the air, appearing to land on the hood of his car. At 7:27 a.m. another white object appears thrown near Pribyl's front windshield. Building Trades counsel (with back to it) engages Thompson in discussion. Gate C remains blocked until after 11 a.m. No Brown & Root employees were allowed to enter, with the sole exception of Pribyl at 9:05 a.m., after Bobby Thompson spoke to the pickets. At 11 a.m., the gate was still blocked so Employer notified its employees located at a staging area, a couple of miles away to go home. About 10 minutes later, the gate was cleared. Employer notified its employees; and they were able to enter at 1 p.m.

At 9:51 a.m a picket was present dressed in a rat costume. Norman has testified relatedly without objection that the rat costume is used nationwide by unions at many locations where they are picketing nonunion construction; and, it is used as a symbol of nonunion labor. (In this record, the same costume appears identified with a carpenters union national campaign. Compare R. Exh. 125 and above videotape excerpt.) Other than Norman's observation that at one point an (unidentified) boilermaker had stood next to the picket in the rat costume, and that McCormick was present this day, there is no evidence that is presented that the Boilermakers had used the rat costume in any material times (or, contrary to the import of director of organizing Jones' testimony).

k. *Picketing at Brown & Root gate on October 13, 1989*

Finally, Employer relies on contention that on October 13, 1989, McCormick was among 70 pickets at gate C blocking employee egress. Employer relies also on assertion that secondary signs in use there include ''Keep Brown & Root out of Institute'' (Tr. 4041, 4044–4046; R. Exh. 119, 10/13/89, 3–4:04). Employer would also observe that McCormick participated in conversation with state police (Tr. 4050, 4052; R. Exh. 119, 10/13/89, 5:21).

Norman testified that by 4 p.m. there were about 70 pickets at Brown & Root's gate. Present at this time were Bobby Thompson, Fisher, McCormick, and Building Trades Counsel. At about 3 p.m. that day Thompson, McCormick, and other pickets had measured the distance from the centerline to Rhone-Poulenc's property line across the roadway entrance. By 3:58 p.m. the pickets massed in gate C's roadway, and prevented Brown & Root employees from leaving at 4 p.m. One picket who is in the roadway at 3:58:02 p.m. has a sign ''Keep Brown & Root out of Institute,'' with others blocking exit of Brown & Root employees 4:03:59 p.m. Thompson and Fisher are in the front blocking the first vehicle from exiting.

At 5:21 p.m the Building Trades Counsel beckoned and Thompson, Fisher, McCormick and two–three other (unidentified) pickets come over. Thompson and McCormick then return to the pickets 5:26:15 p.m. After 1 hour and 20-minute discussion between Building Trades' counsel and state police, pickets parted and Brown & Root employees were able to start to leave at 5:27 p.m. Norman testified that on this occasion as Brown & Root employees left that day, the pickets yelled ''rat'' and ''scab,'' and vandalized cars, including, moving a driver side rear view mirror, and, then tearing a temporary license plate off of an exiting truck. In regard to this incident, Norman testified (credibly) he was in the Brown & Root security trialer observing the act with binoculars. The picket surrendered the license to an observant police officer; and, that picket, though unidentified, appears promptly (but only temporarily) taken into custody by the state policeman.

In any event, there was no evidence presented any named applicants had engaged in this conduct. Otherwise, however, there can be little doubt that the conduct being described (and all other like it) was in nature, not of a protest, but in nature picket line misconduct (Tr. 4042–4043). Norman testified that other signs in use that day said, ''Stop Union Busting; Labor Solidarity Works For You; and West Virginia Labor Solidarity Committee.'' (This and other activity of these organizations, one of which was not established, do not add materially to this case.)

l. *Picketing at Brown & Root gate on October 16, 1989*

On October 16, 1989, the pickets began arriving by 5:30 a.m. By 6:30 a.m. there were about 45 pickets. During the morning the pickets blocked vehicles from entering anywhere from 1–15 minutes. The pickets blocked Pribyl from entering at 7:25:19 a.m. (R. Exh. 19). Thompson is present. Video tape also shows Fisher with a video camera appearing to take pictures of Pribyl 7:25:24 a.m.; and later of three occupants in a blocked vehicle 7:56:11 a.m. as they attempt to enter the gate. Pickets crowded the cars, causing them to proceed extremely slowly; and, pickets called those entering ''scabs;'' and, on occasion ridicule an occupant's facial characteristic, while pickets blocked passage. Norman called the Kanawha County Sheriff's office for assistance, but they did not respond. By 4 p.m. that afternoon there were 70 pickets. The pickets massed in front of the gate and blocked vehicles from exiting as was done on October 13, 1989.

Norman testified that many of the same pickets later picketed Shomo's house that evening. There is no evidence that any of the named applicants had participated in that picketing.

m. *The October 16 temporary restraining order hearing*

On October 16, 1989, Brown & Root sought a temporary restraining order. Norman testified credibly, after the presiding judge, who knew Thompson, was shown excerpts of the above conduct, on judicial inquiry why Thompson engaged in this type of activity, Thompson replied: ''Shomo had mislead him about the bidding; that they had planned to give the project to Brown & Root all along; they had to keep Brown & Root out of the Kanawha Valley; he had worked all of his life to make the Valley the way it was, and Brown & Root would destroy it by bringing in nonunion unskilled labor and they would perform shoddy work and would [sic] lose union jobs to out of state workers.'' He said, ''I'm going to stop them no matter what I have to do.''

A consensual TRO (without hearing) issued October 16, 1989, with hearing for temporary injunction set for October 26, 1989. The judge directed that a copy be made of the 3-hour videotape made of the picketing that was conducted on the morning of October 16, 1989; and that it be given to the Building Trades Counsel, which was done on October 17, 1989. Bobby Thompson left at 4 p.m., with statement he had to go to the picket line to inform the pickets of the restraining order, which he promptly then did. There was no picketing on October 17, 1989.

n. *Picketing at Brown & Root gate on October 18, 1989*

Employer posted a copy of the restraining order in celophane protector on the chain link fence. Norman testified generally we began to see new, and more safety oriented signs than what we had seen before; and signs referring to Shomo including: *''Shomo send Brown & Root Home''* and *''We Can't Trust Shomo''* and *''Rudy Shomo lies.''* Videotape offered of this date shows Thompson transporting signs in his car, and distributing them to pickets. One such sign said, *''Brown & Root Hazardous To Us.''*

On this day, six women with black ballons take up an initial standing position in front of the gate with signs; and later at Thompson signal, they begin patrol circle in front of gate C. One sign they carried says, *''What's Brown & Root got to lose;''* another, *''Do you want to look like this''* (with figure); another *''I want to grow up here not be blown up here;''* another with what appears to be *''Brown & Root dangerous to our community;''* and, *''Rudy Shomo lies.''* The other reported Shomo signs, however, do not appear on videotape. A large sign by another picket west of the road entrance says, *''This is Home.''* McCormick is later present. There is no blockage of traffic this day.

o. *Picketing at Brown & Root gate on October 20, 1989*

On October 20, 1989, there were approximately 35 pickets. McCormick was present. Norman testified that McCormick gathered up the picket signs that day. Videotape shows McCormick with a number of signs in his hands. The signs are not legible. Perpindicular lines had been established to identify the contours within which there could be but six active pickets. Pickets standing east of the perpindicular line on the east side of gate C this day were in conformance with the TRO. To the extent Norman has asserted that the pickets picketed gate A on this date, and/or would assert it did so by some measure of standing near Gate A next on October 23, 1989 (or any date after October 16 consensual TRO) the argument(s) is (are) wholly unpersuasive.

p. *Picketing at Brown & Root gate on October 23, 1989*

There were approximately 30 pickets present. Present this day were Bobby Thompson, Fisher, and McCormick. Thompson and Fisher are identified on the video excerpt initially alone with one picket. At 3:54 p.m. Thompson has a sign, *''Shomo doesn't tell the truth.''* Fisher's sign is not legible; and the third picket present at this time carries a sign that appears to say, *''Brown & Root hazardous to us.''* Later at 4:35:17 p.m. McCormick is present. The sign he carries is not disclosed of record. Another picket carries a sign *''Help Us Save Our Valley;''* and another, *''THIS IS HOME.''* The working hours for Brown & Root were changed this day from 7:30 a.m. to 4 p.m. (Monday through Friday) to 7 a.m. to 5:30 p.m. (basically a 4-day week, Monday through Thursday, though most Fridays there was overtime). The pickets left at 4:50 p.m., thus, before shift ended.

q. *Picketing at Brown & Root gate on October 26, 1989*

Norman relates that picketing began on October 26 at about 3 p.m.; and, the number of pickets reached to about 75. Present that day were Fisher, and James Rogers, a carpenter local union official. Hours of other contractors had remained (unchanged) ending at 4 p.m. To extent, however, Norman asserts the pickets picketed both both Brown & Root gates C and A the (other) ''Nonunion contractor'' gate, under the circumstances of these maintained gates, I find that argument is not persuasive. Rather I find that there were pickets lined up west and east of gate C entrance, but the proscribed number appear in the roadway (R. Exh. 127); and, in any event the sufficiency of continued compliance with consensual TRO is for other forum. For the Board's purposes, there is no blockage of vehicles, nor picketing action reasonably shown being directed at gate A. Employer's ob-

servance that Fisher on occasion appeared to direct his video camera in the direction of gate A does not persuade me to the contrary, as another hearing was upcoming.

Norman, however, also testified that on this day nails had been placed in the driveway of gate C; and on occasion that day, certain woman and children pickets stood in such manner as to attempt to conceal from Norman's view, the action of two or three other pickets appearing to maneuver with their feet the roofing nails on the ground to stand upright (R. Exh. 128), presumably, so as to the more ready come in puncture contact with the tires of cars as they exited and turned right (as was almost always done by the exiting cars at this time). I credit Norman in this regard, including his testimony Employer necessarily had to delay its employees exit for 1 hour and 15 minutes while Employer cleared the exit roadway of the nails. The two or three pickets who appeared to have participated in such conduct with nails, are not identified. Even more notably, there is simply no evidence presented that McCormick, or any of the named Boilermaker applicants had participated in this conduct; let alone that McCormick or they were there that day.

r. *The hearing for a preliminary injunction on October 27, 1989*

A further hearing was held. Present were Thompson, Fisher, and union counsel. Picketing at Brown & Root's gate C appears uneventful in November.

s. *Local 667 membership ''Fight Back'' encouragement*

In a November 17, 1989 notice to all members, Lovejoy and McCormick said: in pertinent part:

> We would also like to remind you that the Charleston Building Trades and Concerned Citizens are still conducting demonstrations against Brown & Root USA, Inc. at the Rhone Poulenc plant at Institute, West Virginia. The demonstrations are currently scheduled every Monday, Wednesday, & Thursday evenings (except holidays) from 3:30 p.m. to 5:00 0r 5:30 PM. It is extremely important to have a large number of people present at these demonstrations. If our numbers decrease, then Brown & Root and Rhone-Poulenc will consider us defeated. There is [sic] rumors that Dupont, located at Belle, West Virginia will be letting a large contract out for bid. It is also rumored that four (4) non-union and four (4) union contractors will be permitted to bid on this project. Brown & Root will be one of the four non-union bidders.
>
> Several of our members have contributed their time and money into this ''Fight Back'' effort with contributions to S.A.F.E., Safety and Fair Employment. Our members [sic] spouses, children and retirees, have been very much involved. Their contributions and presence at the demonstrations are greatly appreciated. Your Local Lodge, State and Charleston Building Trades are greatful [sic] to all who have helped in this effort. The days currently scheduled for demonstrations at Rhone-Poulenc can change so we would suggest you check with the union before coming to help us. If you can come, bring a car load with you. Family and friends are welcome.
>
> We are enclosing a notice of two very important gatherings. These are special events promoted by the Charleston Building Trades. We are looking forward to having a large turnout of members, their families and friends. Please advertise these rallys in your area so we can draw a large number. Please support the fight against Brown & Root in the Kanawha Valley area now. If they are successful here we will be unable to stop them. Your community may be their next target. *Your help is desparately needed now.*

One of the events was the rally at the State Capital held on December 3, 1989, on the aniversary of the Bhopal tragedy (December 2–3, 1984) in which 2500 to 3000 are reported to have died.

t. *Picketing at Brown & Root gate on December 8, 1989*

Norman continues that pickets began arriving on December 8, 1969, at about 6:05 a.m. Shortly thereafter a camper and a hearse were parked on either side of the gate C entrance. (Kilburn's placement of these vehicles in first use on December 5, 1989, however, is credited.) Norman otherwise testified that they were used most every day thereafter. The camper was parked on the west side of gate C parallel to Route 25, probably 6 to 8 feet off the roadway. The hearse was parked on the east side of gate C parallel to Route 25, again, probably no more than 6 feet off the highway. Pickets typically would stand on the west end of the hearse and then along the driver's side.

Norman has summarized relatedly (with support of Brown & Root employees): that the position that the camper and the hearse were parked in made it very difficult for departing employees to see on-coming traffic (moving west to east). Besides the camper and hearse there would almost always be a coffin placed on top of the hearse or on the side of it, further impeding vision. Big flags, primarily the American flag and the West Virginia State flag were often draped off of the camper in an asserted manner that again prevented a good view of on-coming traffic as employees were trying to exit. Norman testified, the impact was that for the next 6 months it was very dangerous for traffic attempting to exit the plant through gate C. Norman recounted there were numerous close calls where employees were unable to see on-coming traffic and they had narrow misses with traffic travelling on Route 25. It was a very large problem for Brown & Root employees until June.

In Boilermakers Local 667's minutes of December 9, 1989 (R. Exh. 71), as noted, McCormick reported that beginning Monday morning (December 11, 1989, which notably was to begin the 13th week of the demonstration/picketing) the Boilermakers would run the demonstration picket daily for a week against Brown & Root; and, ''two one-half day shifts were set up for 2–3 people beginning at 6 a.m. Monday morning.'' Notably tose notes record the pipefitters were in charge the *prior* week. The minutes also record: ''A motor home will be available as well as the old hearse and casket for harassment purposes.''

McCormick testified the motor home's purpose was for inclement weather; and, he testified that the hearse and casket's purpose was to get attention from the community; and, to remind the people of what had happened at Bhopal, be-

cause of the MIC unit that was in Institute. In denying that the vehicles were parked in such a way as to make it difficult for people exiting, McCormick added, not according to the judge. We had a certain designated area that we were allowed to put those vehicles there; clarifying promptly however, I did not put them there, SAFE put them there.

The December 9, 1989 minutes record:

> A mass demonstration is planned for Tuesday morning at 6:00 AM. Also Wednesday afternoon at 3:30 PM and again on Thursday morning at 6:00 AM. He [McCormick] informed the Body that the *Building Trades* was experiencing some difficulty in getting a TV station to carry our ad. The advertisment, if aired, could cost around $20,000. for spots during prime time. Advertisements have been published in the newspapers 2 or 3 times.
>
> Bus. Mgr. McCormick expressed appreciation to the Boilermakers for helping when called upon while acknowledging that the other crafts were not helping like they should. He also stated that Dupont Bell [sic] plant manager had served notice for the next major job at their facility that he was prepared to go merit shop.

u. *Picketing at Brown & Root gate on December 11, 1989*

Norman testified that pickets began arriving around 6:05 a.m. and stayed until approximately 5:20 p.m. The pickets numbered about eight a day. According to Norman recollection, one sign in use that day said, ''*Danger, Rhone-Poulenc doesn't care.*'' Although Norman did not recall any others, the only signs used in picketing on this day that are discernible from videotape supplied of the picketing at gate C for this day are clearly of safety origin: a rectangular sign ''*Remember Bhopal*'' and top curved (tomb-like) signs stating: ''*Rest in Peace Nitro*'' and, ''*Rest in Peace South Charleston.*''

A picture taken by Norman that day, however, shows the first above (large rectangular) ''*Danger . . .*'' sign (R. Exh. 132). Norman placed McCormick there at 7:09:14 a.m, with a picket with sign nearby. The sign (because of darkness illegible) was in (tomb) form similar to those signs displaying ''*Rest in Peace*'' theme. The sign that McCormick is carrying (in R. Exh. 132) would appear to be ''*Remember Bhopal.*''

One picket is observed on video in early morning picketing to yell at the Brown employees as they entered, ''Hey, rat, how you doing,'' ''scabby bastard,'' and ''Hey scab.'' The picket is not identified. Employer would otherwise have observed that that afternoon a video camera was set up on a tripod seemingly directed at gate C (and that afternoon a picket went over to the camera at a time when a truck entered through that gate C. It will be recalled that Kilburn's testimony summarized relatedly that picketing at the main gate was uneventful during December 1989.

v. *Picketing at Brown & Root gate on December 12, 1989*

Norman relates that picketing began at gate C at about 5 a.m. and ended about 5 p.m. The maximum number of pickets were between 25 to 30. Norman testified explicitly that later that morning two pickets picketed at gate A the (other) nonunion contractors gate. Yelling at those entering Brown & Root employees continued that morning (as it did the next day). E.g., a picket yelled, ''[S]rike breaking scab,'' ''hey, rat,'' and, ''There's a real rat.'' The pickets yelling were not identified.

Norman testified that on December 12, 1989, he took a picture of pickets at gate C and it shows two pickets on the west side of gate C. One of the two pickets (whom Norman identified as Fred Chandler, and an employee of Rhone-Poulenc) and thus not one of the 47 named applicants) is holding a sign that states, ''*Danger Brown & Root must go*'' (R. Exh. 138). Another (unidentified) picket carried a sign (R. Exh. 139) that says: ''*Danger (in red) Rhone-Poulenc Doesn't Care [in blue.]*''

Norman complained about the conduct of the pickets and the placement of the camper and hearse as a danger to employees driving in and exiting, to no avail.

w. *Picketing at Brown & Root gate on December 13, 1989*

Pickets began arriving at 5:40 a.m. and stayed until approximately 5:20 p.m. They numbered as many as 24. Present were McCormick, and also Fisher and Sutphin. On this morning when a black man entered gate C a picket yelled ''black rat.'' The picket yelling was not identified. Other pickets later yelled ''rat'' scab'' and, certain obscenities. None of the pickets doing so were identified.

Later, a picket stands by the video camera as if taking Norman's picture as Norman took a picture from the security trailer. Tom Lucas is one of the pickets located behind the camera, carrying the above sign that said, ''Danger Rhone Poulenc doesn't Care'' (R. Exh. 141). This incident on December 13, 1989, was prior to his employment the next month; and, Norman did not identify Lucas as in this picture until during the hearing. Norman also identified Thomas as being present (R. Exh. 143) and James Hudson (one of the 47 named), standing to the west side. (Norman credibly related people at Rhone-Poulenc had identified Hudson to him.) Contrary to Norman's account (of R. Exh. 142) I do not find therefrom that there were ''ten 10 pickets stretched out across gate C'' (nor from R. Exh. 144) (at least) in the sense of, and I thus reject any implication intended that there was a gate blockage this date. In my view, there are three standing in roadway entrance (R. Exh. 144), none of whom are either McCormick, Thomas, or Hudson; and no blocking of any vehicle is evidenced that day. Otherwise I do find that the incidence of pickets standing around McCormick is congruous with recorded McCormick statement in union meeting of Boilermakers' responsibility for manning for that week.

x. *Picketing at Brown & Root gate on December 14, 1989*

Pickets began arriving at 5:20 and by 7 a.m. there were 35 pickets. The pickets in the afternoon numbered about seven–eight. Norman asserted that there was a brief blocking of vehicles that morning, and much verbal abuse. (The blocking such as is observable on video is occasioned by the pickets being close enough to a car on either side so as to cause a driver to proceed the more slowly in the entrance roadway, at which point the opportunity for license reading was en-

hanced. The vehicles were not blocked as they had been on earlier days.

Norman testified credibly, however, that there was also some vandalism to vehicles reported, i.e., cheese was thrown on vehicles (usually the windshield) as they entered and tobacco was spit upon vehicles as they entered (estmated as occurring between 5:45 and 5:51 a.m.); and a car door was scratched. For about 1 hour and 15 minutes Norman observed pickets engage in certain described conduct on the basis of which (I find) pickets occupied positions close enough to the roadway so as to cause entering vehicles (including that of Norman), to proceed the more slowly in dark morning hours, while another picket endeavored to read licenses to another picket who wrote down license tag numbers, while from time to time another picket threw (the described) cheese on the vehicle. Video evidence (including that from special hand held camera Norman had placed across the road), warrants finding some of the statements made as Brown & Root vehicles entered are: ''Hey scab,'' ''Scabby,'' ''Here, have some cheese,'' ''I want to see what an american scab looks like,'' ''I bet your wife is proud of you, you peice of shit,'' ''Big cheese rat,'' and ''Got that number SPG 107.''

Norman testified that 45 employees made complaints of vandalism or other misconduct perpetrated upon them. There were also wives and fathers who had brought employees to work who complained that when they left they had cheese and spit thrown on their vehicles, and they were verbally abused. Norman called the police, reporting the above; and they arrived at 6:15 a.m., but took no enforcement action; and, they left at 6:30 a.m. When the police left, the pickets continued as before, indeed according to Norman, increased the throwing cheese; spitting on cars; and cursing. At 6:45:15 through 6:45:30 a.m., in what was clearly pejorative terms, and on more than one occasion, a picket told a black man to ''Go back to Texas;'' and later, with and without obscenity, ''you better get off our job.'' According to Norman, nails were also placed in the driveway this day. McCormick is not claimed, nor shown present. Moreover, none of the pickets present that morning were identified by Norman. There is no showing that any of the named applicants were present that morning.

On December 15, 1989, Brown & Root sought further court relief. Present were Thompson, Fisher and Building Trades Counsel. Gilmer never appeared at any court session. At no court session did the unions, etc., contend that Brown & Root was using any gate other than gate C. According to Norman, on this occasion Bobby Thompson informed the judge the reason they were picketing at Rhone-Poulenc, and more specifically gate C was (1) Rhone-Poulenc, Union Carbide, and DuPont had decided to use nonunion labor; and (2) because Brown & Root was unsafe.

y. *Picketing at Brown & Root gate on December 19, 1989*

Picketing occurred from about 5:45 to about 8 a.m. There were approximately 30 pickets present. Thompson, Fisher, McCormick, and Thomas were present. At 6 a.m. McCormick has a sign hanging from around his neck that says: ''Do You Want To Look Like This'' (with a drawn skeleton). The epithets are more subdued this date, ''hello rat'' and ''morning scab.'' Norman observed a picket on east side of gate C kicks at a car as it turns into gate C. But to extent claim is made that McCormick has picketed gate A on basis of Respondent's Exhibit 119, December 19, 1989, 7:08 a.m., in my view the contrary is more shown at 7:08:59 a.m. (In light of the finding (essentially) of a more revealing view, and the number (more than 6) there, neither R. Exhs. 150, nor 151, nor Tr. 4155 persuade me to contrary.)

z. *Picketing at Brown & Root gate on January 22, 1990*

Norman was out of town for a month, returning on January 22, 1990. On that day pickets began gathering around gate C reaching about 50 by 4 p.m. According to Norman they spread out to gate A. According to Norman, present were Fisher, McCormick, Tommy Thompson, and Sutphin. Norman testified that later that day as employees attempted to leave through gate C, two large flags were used by pickets in a manner that made it difficult to see oncoming traffic; and, there were several close calls with oncoming traffic as employees attempted to exit the project. The video excerpt submitted for that day 5:33 and 5:34 p.m. shows the exiting vehicle involved in the described dangerous incident had turned left (notably, contrary to prior company direction, and notably that during the time it waited to do so, all the lane of exiting cars turning right (as directed by the company) had cleared without any such incident). The flag use described on this occasion is not visible in the excerpt submitted. Where pickets were standing did not adversely effect the several exiting cars turning right. In this instance, I am not persuaded the facts shown by offered evidence are sufficient to support the ultimate fact here being urged. (See similarly insufficiently established incident on May 3, 1990, below.)

Norman asserts that the picket signs in use this day were: *''I lost my job to Brown & Root''; ''Give the boot to Brown & Root''; ''Rhone-Poulenc doesn't care''; ''Rhone-Poulenc an unsafe plant with Brown & Root''; ''Be Safe, Boot Brown & Root'';* and *''Rhone-Poulenc and Brown & Root Equal An Unsafe Plant.''* No signs are discernible in the video excerpts submitted. Norman testified that he took a picture of certain signs used that day, namely *''Rhone Poulenc An Unsafe Plant With Brown & Root''* (with a picture of a skeleton), *''Be Safe Boot Brown & Root.''* A third sign appears to say *''Rhone-Poulenc + Brown & Root = An Unsafe Plant.''*

While in photo (R. Exh. 152) the pickets are east of the hearse, on this occasion they have their backs to the road and the picture more indicates it is the end of the day. On more than one occasion I have been forced to observe from offered evidence and the evidence of record considered as a whole that the evidence offered to establish that there was picketing at gate A was simply repeatedly too strained. There was continued picketing on January 23, but Norman did not go into details (but see his continued summary of signs below). Norman next testified as to certain picketing on May 1, 1990.

aa. *Picketing at Brown & Root gate on May 1, 1990*

Norman testified that the pickets arrived at gate C at about 6 a.m. and stayed to 5 p.m. There was one large sign by the side of the road, near the front (west end) of the camper that said, *''100 WV Jobs GONE Brown & Root''* (R. Exh. 153).

bb. *Picketing at Brown & Root gate on May 3, 1990*

Norman testified that picketing started at about 6 a.m. and lasted until approximately 5:30 p.m. There were a maximum of 15 pickets. Fisher was present. The same sign as on May 1 was present. Another sign said, ''*Save Our Jobs*.'' Norman's account of another near miss collision on May 3, 1990, is not persuasive in light of the number of cars turning left without any incident, and what the car purportedly involved actually did, in going up to the road and then stopping to let the oncoming traffic pass.

Norman otherwise testified in summary he had seen the following signs at gate C that said: ''*We can live without Brown & Root*'' on February 23, 1990; ''*Brown & Root go home,*'' on February 28, 1990; ''*Brown & Root Kills Them, We Bury Them*'' on March 1T, 1990; ''*Brown & Root Legacy, Shoddy Workmanship*'' and ''*We Demand A Safe Work Plant, Rhone-Poulenc*'' on March 21, 1990; ''*Check Their Record, We Did*'' on April 12, 1990; ''*Danger, Brown & Root working*'' on April 23, 1990; and also, ''*Brown & Root Retirement Plan*'' on a coffin, propped up against the hearse, sometime in the spring (1990). (Norman also testified he had seen the following sign at gate C that said: ''*Keep Brown & Root out of Institute*'' on October 2, 1989, though it is apparent he did so at best only from review of video, as he had not arrived until October 9, 1989.)

Similarly but only more so with regard to seeing signs at the main gate. (Of such order are: ''*Brown & Root Go Home*'' and ''*Rooty [sic, Rudy] Shomo lies*'' on September 17, 1989; ''*Give The Boot To Brown & Root*'' and ''*Say No To Brown & Root*'' on September 19, 1989; ''*Rooty [sic, Rudy] Shomo doesn't tell the truth*'' on September 19, 1989; ''*Workers of the World Unite With Us, Keep West Virginia Union*'' on September 22, 1989; ''*Shomo Lies*'' and ''*Rooty [sic, Rudy] Shomo lies,*'' and a sign that says ''*Say no, call 747*'' on September 25, 1989; ''*Want Your Job, Brown & Root*'' ''*Give The Boot to Brown & Root*'' ''*Send Brown & Root Packing*'' on September 27, 1989.) I do credit Norman testimony that he saw a prohibit *Shomo sign, a circle with the word ''Shomo'' written in the circle and a slash through the circle*, on December 6, 1989; and Norman assertion he observed a picket wearing a T-shirt and printed on the *T-shirt was ''Give The Boot To Brown & Root* on January 25, 1990; ''*Rhone-Poulenc doesn't care about our community*'' on January 30, 1989; ''*Rhone-Poulenc is unsafe plant with Brown & Root*'' on January 31, 1990; ''*Support SAFE, Boot Brown & Root*'' and a coffin and a skeleton with the sign, ''*Brown & Root Victim*'' on February 7, 1990; ''*Remember We Must Live With Their Work*'' on February 14, 1990.

Norman asserts generally that he saw at gate A: ''*Rhone-Poulenc Can Stay, Brown & Root Must Go*'' on February 22, 1990; ''*West Virginia Jobs Gone To Brown & Root*'' on April 10, 1990; and at unidentified location, the sign ''*Rhone-Poulenc Isn't Concerned About Our Community*'' on January 22, 1990.

cc. *The individual misconduct that is contended shown*

Norman testified in summary that he did not identify any of the 47 named applicants at the main gate through license tags. Norman related that he found that five of the named applicants had their licenses checked, but (unconvincingly) then did not remember the names of any of the five. Norman acknowledged that he did not identify any of the named applicants as involved in the above reported acts of violence at gate C; nor had he identified any of them as engaging in blocking egress or ingress there. At best he recalled and identified Hudson Sr. as standing in such manner as to require a vehicle to drive around him, but could cite no specific instance where Hudson Sr., had blocked a vehicle; nor did he see Hudson damage any car.

Employer nonetheless contends that six applicants are identified as having engaged in additional, specific, and unlawful conduct. Employer contends that *Larry Johnson* and *Lowell Templeton* have picketed at Rhone-Poulenc's main gate above in violation of Section 8(b)(4). Employer further contends *James Hudson, D. Mosteller, E. W. Mosteller* and *G. Mosteller* were identified as blocking the ingress and egress of the Brown & Root gate C; and, Hudson also as striking the hood of an employee's vehicle at Brown & Root's gate C below in violation of Section 8(b)(1)(A), in addition to having participated in certain claimed unlawful 8(b)(4) picketing. The circumstances of these contended misconduct incidents are more conveniently discussed below.

dd. *The dispute over those who have testified they did not picket*

Charging Party contends that six applicants never engaged in picketing: Jerry Wallis, Roger Griffith, Rodney Lamp, Timothy Oldfield, Jeffrey Cronin, and Ken Martin. Employer contends, Cronin, Griffith, and Lamp were identified as having picketed by fellow picketer Ronald Elliott (Tr. 2434–2435). Hence, it argues that the Boilermakers are incorrect in asserting ''Brown & Root clearly had no defense concerning these six (6) individuals.'' See *Rapid Armored Truck Corp*., 28 NLRB 371, 382 fn. 65 (1986).

Elliot recalled he engaged in picketing several weeks after he applied, probably a dozen times. Elliot carried a sign each time. One said ''*Unfair,*'' and one he carried said, ''*Give the boot to Brown and Root*'' McCormick did not tell him to go down and picket at Brown & Root. No one realy told him to go down, he heard about it from the community and the news. Elliot was protesting unsafe practices of Brown & Root. According to the newspapers, they (Brown & Root) had a lot of trouble with the stuff they built not working right.

In inquiry on the matter of others picketing, Elliot testified tersely:

> Q. Mr. Elliot, I'm going to show you what's been marked as General Counsel's Exhibit 1 (v) and direct your attention to page 5. There's a list of names on here, I'd like you to look through those names and tell me which of these people you also saw on the picketline when you were down there. (PAUSE)
>
> A. What did you want me to do to that?
>
> Q. I want you to tell me which one of the people listed on that list you saw down at the picketline when you were down there.
>
> A. At one time or at—
>
> Q. No, at anytime.
>
> A. I saw several of them there.
>
> Q. Okay, tell me their names, please.
>
> A. Asbury, Barker, Carpenter, Cashdoller, Combs, Cox, Cronyn, Frye, Griffith, Jeffers, Kelly, Johnson,

Lamp, Marion, Mosteller, Pierson, Pinkerman, Smith, Prouse, Webb and Wise.

In contrast, Cronin testified he did *not* engage in any picketing at Rhone-Poulenc. Some of the guys who were going there, some of whom were Boilermakers (and others not) had asked him to go, but he was too busy to go. They said, unsafe practices are taking place, and we need to take care of it. He could not recall who had asked him, it was just general talk. But Cronin then testified with ring of truth to it, ''Which, I was really ashamed of myself for not going. I should have let my own personal things go, to go down there and walk the picket, to help keep the unsafe out of the valley area but, I never went.''

Griffith was aware of picketing activity at the Rhone-Poulenc site, but he testified that he did not participate in it. Griffith knew of SAFE, but he also did not participate in it, either. Lamp did not participate in any picketing; and, he also did not participate in SAFE.

What is remarkable is not that one employee (Elliott) has recalled 3 named applicants (Cronin, Lamp, and Griffith) who have testified that they did not picket, but that 18 others who reviewed the complaint list did not recall seing Cronin, Lamp, or Griffith, or the others present. On the weight of the more credible evidence I find the three witnesses' individual denials of having engaged in picketing are the more reliable, and I credit them; and I thus find Elliott's recollection just erroneous. To the extent Employer has urged that ruling initially made on on fishing expedition has precluded establishing its defense that all six individuals who have testified they did not picket, did so, the contention, in my view, is without merit. Apart from substantial probe with others no showing was ever made any previously called witness was likely to have had knowledge of their presence, or misconduct on any picket line.

5. Other events of note

a. *Brown & Root's safety talk to contractors on November 15, 1989*

On November 15, 1989, the West Virginia Chapter of the ABC, sponsored a talk by Brown & Root Safety Supervisor James D. Thorn on the subject of ''Safety Programs—The Who, What, Where and How.'' The announcing letter stated:

> Does your firm have an adequate safety program? If you have *none* or if your program is *only adequate* then you are doing your business and employees a disservice. Safety of your employees aside, it just make sense on the bottom line. There are many, many examples of this. Owners, construction users and other contractors are looking more and more to your safety programs and record in making their contractor selections.
>
> James Thorn will be presenting to our November meeting the ''nuts & bolts'' of what makes a safety program. He will hit especially hard the new hazard communication requirement (subject of our Nov. 88 meeting) which is now being enforced by OSHA. James has been with Brown & Root's safety programming for the last four years and is the Safety Supervisor at their Rhone-Poulenc project.
>
> There are to [sic] many people interested in your safety program not to have one you can be proud of. You may be wondering where the ''When'' is in the subject title. The ''When'' is long passed.
>
> All members and Non-members and their guests are invited. Please make advance reservations.

b. *Boilermakers Local 667 responses*

(1) Boilermakers attendance at Thorn's talk

Employer established that attendance of two boilermakers and three wives at this meeting was arranged under a fictitious corporate name; and it contends the expense was underwritten by Boilermakers Local 667.

Although Local 667 had allocated a contribution of up to $1000 to support SAFE, to date only a total of $428 (from the Local's treasury) has been expended ($300 in payment of the building fund assessment paid to SAFE, and, $128 in payment for purported SAFE expense in sending two boilermakers members and three wives to the ABC meeting. The attendance fees were paid by money order by Lovejoy; and he then reimbursed, with the reimbursement check charged to a SAFE expense payment.

(2) Brown & Root's safety record to be questioned

The participants were supplied with questions to be put to the speaker on Brown & Root's Safety Record (R. Exh. 62c) of nature as follows:

> 1. Are Brown and Root employees at Rhone-Poulenc certified in hazard communication requirements.
> 2. Does Brown & Root screen their employees for drug or alcohol problems.
> 3. Did Brown & Root leave 7 subcontractors hanging without pay and involved in law suits at the South Texas Nuclear Project in 1982.
> 4. How can a large construction Company come into an area and hire unskilled labor to work in such a plant as Rhone-Poulenc and expect the people of the valley not to be concerned about their safety.
> 5. Does the crime rate in communities where you hire so many illegal aliens go as high as proclaimed by Texas law enforcement agencies? (192%)
> 6. Does Brown & Root have anyone working for them who lives at 1107 Virginia Street East? (Kanawha Valley Fellowship Home).
> 7. Is it true that Brown & Root obtains huge numbers of ''man-hours without a lost time injury'' by firing injured workers.
> 8. Does Brown & Root provide a sound health insurance plan for all of their employees? Retirement Plan?
> 9. Why doesn't Brown & Root use Local Building Trades people?
> 10. Does Brown & Root plan to do any maintenance work at Rhone-Poulenc?

(3) Picketing conducted outside the location of Thorn's talk

McCormick testified that the Building Trades and Concerned Citizens picketed in front of the Holiday Inn where the ABC meeting was being held. (The local ABC Contrac-

tors Association of West Virgina, who was putting the program on, had just started up in the State 2–3 years earlier.)

6. Director of Organizing Jones' claimed International noninvolvement; readily apparent limitations; and related documents

Employer established Local 667's Lovejoy and McCormick sent a ''thank you'' letter dated November 29, 1989 (2 months later), to President Jones (below), which letter shows ''cc'' sent to several individuals, including to Director Jones. Jones did not recall reading this letter at the time, either way; and, Director Jones also did not recall Boilermakers International's contribution of $5000 to SAFE to ''be used exclusively in the 'Fight Back' effort against Brown & Root . . . .'' In follow-up, however, to President Jones' letter to Local 667 on the Local's $1000 expenditure, which Director Jones candidly revealed bore his initials, and he acknowledged he had seen (but still did not recall), Director Jones then wrote Lovejoy on November 21, 1989:

> This is in reference to International President Jones' letter of September 26, 1989, authorizing approval of a $1,000 expenditure from local lodge funds for the Building Trades joint ''Fight Back'' effort gainst Brown & Root at Rhone-Poulenc.
>
> Please provide this office with an accounting of how the $1000 was applied to that campaign, as requested in International President Jones' letter.

Jones has also testified that he did not remember this letter, but did not question its authenticity. While I do not find Director Jones early assertion he does not read everything that he is copied implausible, and thus do not find his unawareness of a $5000 contribution to SAFE by Boilermakers International, following Local 667's request, as well, necessarily implausible, it does begin to strain credulity in matters affecting his department. I entertain, however, no misgivings with regard to Director Jones' awareness of International's approval of the Local's $1000 expenditure, especially since, on November 21, 1989, he personally signed the related letter to Local 667, that pursued an accounting from Local 667 on the approved $1000 expenditure, and only the moreso where he refers therein to it being for the ''Building Trades *joint* ''Fight Back'' effort against Brown & Root at Rhone-Poulenc.'' (Emphasis added.)

McCormick affirmed that International President Jones had directed that the $5000 was to be used for advertising, and not for salaries or expenses of Building Trades representatives; and McCormick testified that he was confident that was done. McCormick also testified that Jones did inform that he had directed H. Grotten a vice president, and G. Walser, another assistant to the president to monitor the situation. According to McCormick, they had no continuing contact with him.

I credit McCormick, however, that McCormick did contact (then) organizer Yakomowicz (at least) alerting him, after Brown & Root was on the job, to Local 667's embarkment upon a ''Fight Back'' implementation of attempt to secure employment of Local 667's member-applicants, for declared purpose of organizing the essentially targeted nonunion Brown & Root.

On the matter of (Director Jones perceived) *joint* effort with the Building Trades Council, McCormick explicitly denied that there was a discussion at the February 1989 seminar about coordinating his (i.e., Boilermakers Local 667's) application/organizational activities with the local building trades council, or with any of the building trades unions. McCormick, however, has testified that in a Charleston Building Trades Council meeting (that is regularly held once a week), he probably had informed the Building Trades Council that we (Boilermakers Local 667) were going to have our people make application and start an organizing drive there. McCormick did not recall if there was related discussion about using health and safety issues, or, environmental issues as a way of organizing.

Director Jones did testify, however, it is reasonably frequent that in the course of conducting a fight back campaign that the Boilermakers will attempt to get cooperation and support from either other local unions or the Local Building Trades; and, Employer established testimonially from Jones, instances where the Boilermakers International, and/or other locals had previously done so in its past ''Fight Back'' campaigns.

Jones also testified, however, that the Building Trades normally have their own idea about how they want to organize. Jones agreed it was fair to say that they (a Boilermakers Local and a Building Trades Council) worked cooperatively, but they do so not necessarily as part of a single campaign. Director Jones testified that in his experience, Building Trades combined media use strategies may not be such as that he can direct with all (sic) authority.

Speaking from Boilermakers International's departmental level controlling Fight Back activities Jones did testify flatly that Boilermakers International did not authorize any picketing; and, under the circumstances described here, Director Jones testified he thought a picket line there could have only been authorized by himself, or the president; and, he hadn't seen anything that indicated the president had; that he knows the president's policies; and, the president would almost absolutely discuss it with him.

Director Jones testified that in the seminar they do, and he did in the February 1989 seminar cover the subject of Local members filing applications with a nonunion employer. They instruct the members that they should fill out their applications honestly; and, members are instructed to put information down on their work history with union employers, because it demonstrates their experience. They are also told to make a copy of the application, if they can, and provide that copy to the organizing coordinator if there is one. They take the application to the jobsite; and, they attempt to place their application with the employer. Director Jones explicitly also confirmed in some instances, we will ask employees to put on the application volunteer Boilermaker organizer or volunteer union organizer.

Jones explained that the purpose of doing that is twofold. First, it is to be upfront and honest in the application, but they also want to protect the worker. Jones has testified he does that (now), because, through 10 years of experience in attempts to get hired onto nonunion jobs, we have constantly been discriminated against and they (employers) look at a union background on those applications which we must fill out honestly in the eyes of the National Labor Relations Board, and (when) they see the union background, they

would not hire you. Since Boilermakers now have reputation throughout the country as engaging in organizing, they are trying to protect their (members') rights to organize.

Director Jones asserted relatedly that there were many previous charges brought by the Union that were dismissed by Regional Directors because they said the Boilermakers could not prove union activity. In that regard Jones testified with increased firmness, *if I cannot protect these members' rights to organize, even to the extent that it is simply putting that on the application and helping them get employed on a nonunion job, then I will not be able to get their support in organizing effort. They will see that I cannot protect them. So I have to be able to show the company had knowledge of their union organizing effort.*

On cross-examination, McCormick testified that it was after Brown & Root came on the job that a Boilermakers International organizer, Tony Yakemowicz, had instructed McCormick to have the Boilermakers Local 667 member applicants put ''voluntary organizer'' on their applications. McCormick did not recall any discussion as to the number of members he was to send. McCormick asserts that he understood Brown & Root would employ 300 there, and, if he could have sent more, he would have. McCormick could not say (recall) if Yakemowicz had said to write the words voluntary organizer on the application in earlier seminar. It, however, seems the more likely that was said at one of the earlier seminars. Seemingly contrary to McCormick, Thomas recalled he first received the idea for putting the words ''Boilermakers voluntary union organizer'' on applications at a ''Fight Back'' seminar that he had attended in June 1987, though Thomas also then later recalled attending a seminar held on it more recently in early 1989.

Thomas testified it is not uncommon for members of Boilermaker's Local 667 to now go to work for nonunion employers in order to organize them. Thomas confirmed this was encouraged during the 1987 seminar (Tr. 232). McCormick has definitively testified however, that this organizing campaign at the Rhone-Poulenc jobsite of Brown & Root was the first (one) that he has been involved with as business manager of the local union (Tr. 1448). The same organizing policy is being used elsewhere. This new organizing policy in the construction industry is not one limited to Boilermakers International.

Thomas testified that Brown & Root was not the only company that the Building Trades Council sent voluntary union organizers to, since Thomas has been involved with the Building Trades Council. He cited as an example another company named Consolidated Construction (Tr. 233). Thomas testified that the Sheet Metal Workers Union, and the Carpenters Union sent voluntary organizers in to secure employment at Consolidated Construction in the spring and summer of 1990 (Tr. 233). Thomas otherwise has cited a specific example of recently sending Boilermakers' union members to *another* nonunion company named Ultra Systems Western Constructors, Inc. Thus Thomas had (sic) certain Boilermakers' members put in applications to that nonunion company to try to get hired (Tr. 248). This occurred around the fall of 1990, into the spring of 1991.

In any event, I credit McCormick that he had a more recent conversation with Yakemowicz in September 1989 in which Yakemowicz had (probably) reminded McCormick to have Boilermakers applicants put ''Boilermakers voluntary union organizer'' on their applications. I have credited McCormick in this regard in part because McCormick had no full-time organizer on staff, and, on weight of other credible evidence, I am persuaded that use of his members organizational rights under the Act to fight back in attempting to organize the unorganized was (essentially) a new procedure for McCormick; and, it thus appears as only the more likely that he would have called an International organizer to inform of the intended start of such a campaign by his local union, if not to then request immediate assistance of an organizer representative of International, when it came time to undertake what for McCormick was his first involvement in a new ''Fight Back'' procedure of having volunteer Local 667 union members file applications for employment with a nonunion contractor, with a(n essentially) declared intent to later organize the company upon their hire.

In this last conversation with Yakemowicz, McCormick relates consistently the subject was we (sic, in context Local 667) wanted to start a ''Fight Back'' organizing campaign at Rhone-Poulenc with Brown & Root. McCormick has denied that he had taken part in any earlier planning with Boilermakers International ''Fight Back'' campaign, prior to the time that Brown & Root had started work at Rhone-Poulenc. McCormick quotes Yakemowicz in phone conversation as saying:

> Well, start having the guys fill out the—go get the applications and be sure to put voluntary organizer on the thing. And tell them to be honest on the application and go—if they are hired, go in and do the best they can do to their ability. Do a good job.''

Moreover, I credit McCormick's recollection Boilermakers International's (then organizer) Yakemowicz had told McCormick that the reason for doing so, was, ''We want to be up front that we are attempting or starting an organizing campaign with the contractor,'' which McCormick then repeated to Local 667's applicants.

The statement of being a voluntary Boilermaker Local 667 organizer when made by an applicant at the request (essentially) of local union business manager, McCormick, has not only already been determined lawful by the Board, cf. *AJS Electric*, 310 NLRB 121 fn 2 (1993), but I also have no doubt it was as likely so declared in this instance with purpose (as found above) to establish Company's knowledge of that circumstance under the protective provisions of the Act, should Employer not employ individuals for discriminatory reasons, as director Jones has as much as acknowledged does underlay, in part, the above ''Fight Back'' program strategy.

McCormick has testified that was the last conversation that he had with Yakemowicz. McCormick denied that he also told his members what to do if they were not hired; and asserted severally: he was not in charge of organizing, but he knew what he would do as an individual if he had the same qualifications as the people Brown & Root was hiring, that he would probably go to the Labor Board; and, he guessed if the applicants were not hired, that would be turned over to whoever was in charge of the organizing.

On another occasion McCormick testified it (the local organization campaign) after hire of Boilermakers Local 667 applicants, was going to be turned over to Boilermakers International organizer, James Bragan (who filed original in-

stant charge on behalf of Boilermakers International). McCormick was fully aware of the effect of the Boilermaker applicants applying for work with Brown & Root, especially those who identified years of experience. McCormick has testified on cross-examination, relatedly, in apparent connection with earlier seminar:

> [L]abor laws were explained to us on discrimination. What rights we have if we feel we've been discriminated against. You know, I'm a guy with twenty-six years as a construction worker and I've been through all of this. I have almost sixty thousand hours of experience and you hire, or a company hires, someone with no experience or no qualifications and I can prove that and I feel I've been discriminated against. And I can go to the Labor Department.

Analysis

The General Counsel and Charging Party Boilermakers International centrally contend if, as it has been shown prima facie, Respondent refused to consider for hire, or refused to hire applicants because of their union sympathy, the refusal violates both Section 8(a)(1) and (3) of the Act. Respondent Employer independently violates Section 8(a)(1) of the Act by refusing to consider them for hire or refusing to hire them based on alleged ''misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred.'' *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964)

The Court, in *Burnup & Sims*, stated at 23–24:

> § 8(a)(1) is violated if it is shown that the discharged employee was *at the time engaged in a protected activity*, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.
> . . . .
> A protected activity acquires a precarious status if innocent employees can be discharged *while engaging in it*, even though the employer acts in good faith.
> . . . .
> Had the alleged dynamiting threats been *wholly disassociated* from § 7 activities quite different considerations might apply. [Emphasis added.]

The General Counsel then alternatively argues, assuming arguendo that the applicants who engaged in the protected activity of openly identifying their union sympathies and (prospective organizational) activity on their employment applications also engaged in some prohibited picketing activity (e.g., as I find below Hudson has admitted to have done), or as part of the Union's overall campaign (as Respondent contends) to remove Brown & Root, to determine whether Respondent violated Section 8(a)(1) of the Act, a three step analysis is then applied, based on the model set forth in *Burnup & Sims*, id.

The Sixth Circuit in *Teledyne Industries*, 911 F.2d 1214, 1222 (1990), states this burden of proof standard, thus:

> In *NLRB v. Burnup & Sims* . . . the Court outlined a three-step analysis for determining whether an employer committed an unfair labor practice by refusing to reinstate and by discharging an employee because of strike related activities. . . . [T]he parties assume the first two steps: that Teledyne discharged Wheeler and Stidham for conduct that took place during a protected strike, and that Teledyne discharged its employees in good faith belief that they committed misconduct. See, id. In the third step, the Board must show that the employees did not actually engage in the alleged misconduct.

First, Employer does not seek to defend its failure to consider for hire, or to hire, the 47 named discriminatee-applicants on the basis that they were not qualified. It coud not, successfully. The evidence is also overwhelming, not only that the 47 named discriminatee applicants have engaged in protected union activity in stated engagement as volunteer union organizers, but in that, they picketed, in a substantial measure, because of their safety concerns, both as to on the job working conditions and potential effects on their family and community of any unsafety on the job by Brown & Root's new employees performing construction and maintenance work in a dangerous chemical producing plant, if skilled and safe working personnel like themselves were not hired, as was their right to do also under the statute, by addressing with informational picket the perceived history of unsafe hiring practices of their intended Employer.

But what neither they as individual (or collective) applicant(s) may do, nor their Union do under the 8(b)(4)(i) and (ii)(B) strictures of the same statute, is to seek by picketing, or other *conduct*, to coerce or restain a secondary, or so called neutral employer (here Rhone-Poulenc), or, to induce or encourage employees of that (or any other secondary employer) to withhold their services, with an object of causing Rhone-Poulenc (or any other secondary employer) to cease doing business with Brown & Root, with whom (I find) under the reach of the statute, they had here a primary labor dispute. Here all the picketing/demonstrations of the building trades unions and their members (along with others, including, other unions and their members (local and distant), wives, relatives, and friends, and others with common safety and environmemntal interests, concerns, and causes, were all carried out under the name, if not banner of SAFE.

We may thus appropriately begin with an analysis of SAFE's creation, and its related activities. Employer basically contended, in seeking to establish its defense that the alleged Boilermaker discriminatees have forfeited any employment right because they have engaged in unlawful SAFE picketing, that Bobby Thompson had conjured up the organization known as ''SAFE'' as a building trades ''front organization'' under whose aegis the unions incorrectly believed that they could escape the Act's prohibition against secondary picketing.

Section 8(b)(4)(i) and (ii)(B) of the Act provides:

> It shall be an unfair labor practice for a labor organization or its agents
> . . . .
> (4)(i) to induce or encourage any individual . . . to engage in, a strike or a refusal in the course of his employment . . . to perform any services; or (ii) to threaten, coerce, or restrain any person . . . where in either case an object thereof is—

. . . .

(B) forcing or requiring any person to . . . cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . .

Respondent Employer would thus have observed that the Act prohibits labor organizations from picketing when ''an objective'' of the picketing is to enmesh so-called neutral employers in controversies not their own. *NLRB v. Denver Building Trades Council*, 341 U.S. 675, 692 (1951). Employer correctly observes that in order to insulate the neutral employers and their employees and suppliers from the controversies of others, employers on a common situs are permitted to establish and maintain separate gates for use by those involved in the labor dispute and those not so involved. When such gates are established, a union may picket only at the gate of the employer with whom it has a dispute, as long as the ''primary'' employer's employees and suppliers use only the gate designated for their use. *Sailors Union (Moore Dry Dock)*, 92 NLRB 547, 549 (1950); *Electrical Workers Local 761 (General Electric) v. NLRB*, 366 U.S. 667, 680, 681–682 (1961).

Employer further observes where separate gates are established (as they were here), union picketing is then proper only if:

(a) The picketing is strictly limited to times when the situs of the dispute is located on the secondary employer's premises;

(b) at the time of the picketing the primary employer is engaged in its normal business at the situs;

(c) the picketing is limited to places reasonably close to the location of the situs; and

(d) the picketing discloses clearly that the dispute is with the primary employer.

Moore Dry Dock, 92 NLRB at 549. See generally *Carpenters Local 1622 (Robert Wood & Assoc.)*, 262 NLRB 1211 (1982), enfd. 786 F.2d 903 (9th Cir. 1986) (union violated 8(b)(4) by picketing a neutral gate at a common situs location). Employer further notes the Board there reaffirmed the principle, where a union makes no effort to limit its appeal to a primary employer after separate gates are established, inference is justifiable union's purpose is to cause pressure upon the primary by the neutral employers. 262 NLRB at 1218.

The General Counsel it appears would counter the inference with evidentiary assertions that: *first*, it was not just members of the Boilermakers who were involved in the (SAFE) picketing here, but members of every other union in the Charleston area who picketed, as well as members of the general public who are not members of any labor organization; and, *second, there is a tremendous amount of evidence contained in Employer's own videotapes of the picketing, as well as testimony of the Respondent's own witnesses, not to mention Charging Party Boilermakers International's and/or union witnesses, that the purpose of the picketing at the Rhone-Poulenc jobsite was to protest job safety conditions and possible unsafe work practices that might lead to a catastophe similar to that which occurred at Bhopal, India.*

As to the latter argument, the General Counsel argues the strongest support therefor is to be seen in the fact that the picket signs in regular use for the most part reflected a safety theme; and, that with few exceptions, they did not have the traditional wording that is to be found (in use) at labor disputes; nor did the pickets ''patrol'' or ''slow walk'' across reserved gates, except at gate C, the gate reserved for the primary Brown & Root. In regard to the latter, the General Counsel has (in this part) rightly argued that the Respondent cannot successfully contend that the (building) trade union members (including Boilermakers Local 667 and its members), were engaged in secondary picketing at gate C, which was the gate reserved for the primary contractor Brown & Root, even if it be found that they have in effect urged a boycott of Brown & Root there, i.e., if they had a labor dispute with Brown & Root, *George A. Hormel & Co. v. NLRB*, 962 F.2d 1061 (D.C. Cir. 1992).

The first part of the argument of the General Counsel would appear forthwith deficient in that it would seem to proclaim, contrary to the priciples of the Board's well established *Moore Drydock*, supra, principles and *General Electric*, supra, reserve gate decision that what would otherwise be concluded to be a union's secondary picketing pressure under these precedents might be shielded by a union's act of merely making a common picketing cause with some other organizations at neutral gates, on a safety subject. I do not think that argument if being made is one that is viable under the reach of Section 8(b)(4)(i) and (ii)(B), or the Board's above precedents. In any event, *Laborers Local 332 (C.D.G., Inc.)*, 305 NLRB 298 (1991), in which Employer's urged Section 8(b)(4)(i) and (ii)(B) was found, does specifically inform that the mere fact that most of the signs in use had carried a ''health hazard'' message, does not preclude an alleged secondary violation being found (as there) where based on other convincing evidence of its occurence. On the other hand handbilling unassociated with coercive picketing, that is, patrolling picketing or picketing with some other coercive element, was not banned at the main gate; and, no handbill or other literature in use there has specifically urged any nonprimary employees not to enter the premises, or not to perform services of their employer therein.

Nonetheless, the General Counsel's urgings do not, in my view, take into sufficient factual account certain other activities, e.g., SAFE's and/or the Charleston Building Trades Unions' regular picketing of the Rhone-Poulenc main gate, coupled with Boilermakers Local 667's initial, and continued substantial financial and other unrestricted support of SAFE, including (the reasonably inferable conclusion) of its support of any secondary picketing that may be indicated was being conducted there, especially if SAFE is, as the Employer contended it to be, but an alter ego of the Charleston Building Trades Council. Neither does it take into adequate account in particular Local 667's acceptance of what appears to have been a rotational assignment of manning all the picket lines for a week in December 1989 that included those at Rhone-Poulenc's main gate, used only by Rhone-Poulenc (and Union Carbide) employees. The only question open as to main gate activities is whether the activities at Rhone-Poulenc's main gate remained in nature handbilling, or had become illegal secondary picketing.

It is thus Charging Party Boilermakers International's (al least) more encompassing and consistent position that while

it is clear Boilermakers Local 667 and its members may have been involved in activities directed at Rhone-Poulenc, such involvement *did not arise out of a labor dispute*, but rather arose out of its (and their) community safety and environmental concerns that they have informationally publicized, without illegal ''patrolling'' picketing, or picketing with other coercive element. (To extent the Union has additionally claimed exercise of a constitutional right of free speech associated with its right to also express its claimed safety and environmental concerns in that area, e.g., in the same manner as other groups in the community do, and would reject any of Employer's (asserted) requirements of surrender of that right, the reach of the Act in the instant determined labor dispute is what is here to be evaluated, and where therein a violation is indicated, any resulting imbalance of statutory prohibitions with constitutional rights are issues more appropriately addressed in another forum, though ramifications of the exercise of the statute in that area are not to be needlessly ignored by the Board.)

The Supreme Court has held Section 8(b)(4) of the Act does not ban handbilling that is not combined with picket patrolling or some other coercive element. *DeBartolo Corp. v. Florida Gulf Coast Building Trades*, 485 U.S. 568 (1988). I am convinced and find that the handbilling and demonstration that took place on September 17, 1989, was (at best) picketing not involving picket patrolling, nor picketing with other coercive element, regardless of what SAFE's status is in the picketing.

The relevant facts of the subsequent handbilling and picketing at all the gates, in the background of the construction and maintenance contract award to Brown & Root, of work formerly performed by employees of Rhone-Poulenc and/or Union Carbide, or, on bid, by other union contractors in the area, are fully set forth above. I have no doubt that the underlying circumstance that is described therein is one of a labor dispute between Brown & Root and Charleston and State Building Trades Councils and certain affiliate unions, and as likely, certain incumbent unions, e.g., IAM and CWA, representing certain employees of Rhone-Poulenc and Union Carbide.

At the outset I conclude that neither the General Counsel's arguments for porous reserved gates, nor Employer's arguments advanced generally as to Local 667 officials' and members' secondary picketing of gate A (or B) have been adequately made out. As to claimed violations of the reserved gates, in basic agreement with Employer, even if there was an instance of taint, it was not established as sufficiently substantial or frequent. Kilburn testified credibly that he had established 24-hour guard procedures to ensure security of the gates; all contractors were instructed to conform to their established reserved gate usage; they instructed their employees to do so, and in that regard, Kilburn testified credibly, if he personally saw any violation of the integrity of the gates he would have done something about it. Under all these circumstances, even if some occasion of a contamination of gate(s) did occur, it appears isolated; and, it must be viewed as significant that the unions had never reported any alleged taint to Rhone-Poulenc (or Brown & Root). Hence, in agreement with Employer, it would appear reasonably, that the unions would not be privileged to carry out and sustain any secondary picket message to neutral gates on that account, without the messages being revealed as more secondary in nature, *Moore Dry Dock*, supra. If I have any reservation it more lies in Kilburn's relation that delivery of a combined truckload of both Rhone-Poulenc's and Brown & Root's supplies through the main gate was possible, cf. Electical Workers Local 323 (J. F. Hoff Electric), 241 NLRB 694 fn. 1 (1979). But no evidence is presented of that occurence. Kilburn also testified he had no knowledge of contractors' new employees use of that gate.

There is no clear and convincing evidence shown that the appearance of any pickets handbilling at the neutral gates was accompanied by any patrolling picketing, or by any picketing with other coercive element, *DeBartolo Corp. v. Florida Gulf Coast Building Trades*, supra. The limited time of vehicle gate blockage of Tommy Thompson at gate A and Fisher at gate B under all the circumstances shown above at the very outset of the picketing, in my view, is not sufficient, certainly not to lay on Boilermakers door.

Moreover, even were I to credit other evidence offered as to picketers at Brown & Root gate C being seen on occasion, as contended by the Employer, standing in the vicinity of gate A, the overall circumstances of such picketing as described herein does not convince me there was picketing at gate A with an intended secondary objective on those occasions. Nor was there union blockage of gate A or B in violation of Section 8(b)(1)(A) that was attributable to Boilermakers Local 667 officials, or members.

The General Counsel and Charging Party Boilermakers International contend the handbilling and protest-demonstrations (I find picketing) was also conducted primarily on safety issues. With regard to their arguments that the main purpose of the picketing was to inform the public of the Union's so-called ''safety'' concern—of what could happen ''in this chemical valley'' with ''the type of people'' that Brown & Root was employing (Tr. 3021), Employer broadly cross-contended that this argument is legally irrelevant, since the evidence (viewed in its entirety) reveals that at least one object of the picketing was to coerce Rhone-Poulenc to cease doing business with Brown & Root.

The General Counsel counter-argued that claimed evidence of picketing activity in violation of Section 8(b)(4)(i) and (ii)(B), or other unlawful picketing such as in violation of Section 8(b)(7)(C) (or Sec. 8(b)(1)(A)) by Boilermakers Local 667 or its members, even if such were to be proven by Respondent, would not be relevant to an issue of whether any of the Boilermakers' discriminatee-applicants had lost the protection of the Act, absent there being specific evidence of some misconduct by a specific discriminatee-applicant. The Union similarly asserts both SAFE and picketing are immaterial and can be made material only upon Employer's showing that a particular employee was engaged in some relatedly illegal conduct.

Placed presently aside is the question of statutory irrelevance of the Union's claimed right of joinder with others in lawful informational picketing in form of a notice to the public of the building trades unions' views on the question of Brown & Root's job safety and other environmental concerns as raised in its labor dispute with Brown & Root at Brown & Root's jobsite at the Rhone-Poulenc plant at Institute, and also leaving for a later analysis the final arguments both Employer and opponent parties have advanced based on their evaluation of an individual's protected vis-a-vis unprotected conduct, and, of the individual applicant's prohibited vis-a-

vis unprohibited activity, that appears to more directly address the Employer's contention for a forfeiture of employment right because of an individual's general engagement in contended Sections 8(b)(4)(i) and (ii)(B) and/or 8(b)(7)(C) picketing that is to be shown such other than by individual conduct, I presently observe and conclude Employer has otherwise correctly advanced the principle that the Board has consistently viewed a union's picketing to be unlawful as long as even one of its objectives is shown as unlawfully secondary, *Electrical Workers Local 6 (International Hotels)*, 286 NLRB 680, 685 (1987). But the fact that the picketing may have other legal purpose would appear to have direct bearing on the issue of relevancy in that it would indicate a statutory warrant may exist for evaluation of an individual's claim of participation in a lawful primary picketing objective, rather than in his union's unlawful secondary activity.

Employer alternatively argues, unpersuasively, that in any case all the purported ''safety'' concerns advanced in this case were a mere pretext for the Union's unlawful secondary conduct. Employer's reliance here is on *Laborers Local 332 (C.D.G., Inc.)*, 305 NLRB 298 (1981), wherein the Board affirmed an administrative law judge's holding that certain union picketing and handbilling that there concerned the use of allegedly ''unskilled'' labor to perform asbestos removal from an office building was but a pretext advanced for a union's jurisdictional attempt to maintain the local union's ''traditional monopoly over the asbestos removal business,'' supra at 304. I need not address any argument that may be indicated to be raiseable by the Building Trades Councils in justification of their demonstrations (or of their asserted picketing) at the Rhone-Poulenc main gate made on the basis of an asserted Rhone-Poulenc obligation in regard to plant or job safety of its contractors that rests on purported West Virginia law, if for no other reason than that matter was clearly not an issue fully litigated herein. Charging Party 2 who (at best) broached the position in Bobby Thompson deposition has engaged in very limited participation of the matters litigated herein.

The basic facts of the instant case appear substantially distinguishable from the facts that appear to have been dispositive in the C.D.G., case, supra. Firstly, C.D.G. had been awarded a contract for certain asbestos removal on the 10th and 24th floors. But unlike here, that was not the first job C.D.G. had been awarded in the building, let alone the area. C.D.G. had been previously awarded a contract to perform asbestos removal work on the third and fourth floor of the same building (but see overall assessed position below).

Second, C.D.G. had employed qualified carpenters who were governmentally certified in asbestos removal; and, in conversations between C.D.G. and Local 332 officials in regard to the award for asbestos removal on the 10th and 24th floors, *C.D.G. told Local 332 officials C.D.G. employed skilled people* under carpenter union contract; and, that it also employed some of Local 332's own members (indeed, it apparently offered to employ as many as 50 percent of them on the new job). Local 332 union officials did not then dispute the qualifications of C.D.G.'s employees; but rather the union officials asserted only: *the job was a big one; Local 332 claimed the work as its own; and they declared flatly C.D.G. would have to sign a contract with Local 332 if they were going to do big jobs in Philadelphia*. (When C.D.G. later began removal of asbestos from the 10th and 24th floors, C.D.G. employed 26 carpenters known as ''asbestos abatement technicians,'' and four members of Local 332, whose assigned job at the time was to carry bags, and remove the packages from the building, though (at least) certain laborer-members of Local 332 were also trained in asbestos removal.)

Third, the judge found in *C.D.G.* that the objective was, ''Local 332 wanted C.D.G. to either hire and use only Local 332 members at area standard wages, or for . . . [the secondary] . . . to cease doing business with C.D.G.'' The judge also found, ''Local 332's alleged safety notice for its actions in this case was a pretext, in an attempt to maintain its traditional monopoly over the asbestos removal business in Philadelphia. *Fourth* the judge found in *C.D.G.*, ''Aside from lower wages, there is absolutely no evidence or testimony in the record to support any safety deficiencies or lack of compliance with any laws or regulations on the part of C.D.G.'' 305 NLRB at 304.

In contrast with the above third and fourth circumstances in *C.D.G.*, on this record, Brown & Root had not heretofore worked in the Charleston area; and, the Charleston Building Trades Council from day one, put Brown & Root's safety and work records in issue in its contract work at a unique MIC producing plant. Though McCormick testified he wanted Brown & Root to hire qualified employees, or, alternatively to leave, Boilermakers Local 667 unquestionably had initially pursued its desire to enable Brown & Root to hire Boilermakers Local 667's qualified members; and, McCormick had personally very early urged many well qualified Boilermaker members to make application for employment with Brown & Root. The fact is none of the Boilermakers Local 667's applicants were ever hired, though they had timely applied, were well qualified, and were in fact willing to work for less than their own area standard wages, because they had applied knowing Brown & Root paid less than their scale, and they did so with outset intent to attempt to organize the jobsite as union, later.

The building trades unions did not enjoy a construction monopoly at Rhone-Poulenc, neither in this year, nor in earlier year. Here the expressed safety concerns were different in nature, degree, and long standing foundation in the community, thus, with potential of readily relating to community safety concerns (rather than more limitedly, jobsite, or work place safety issues), and, thus carried with them a likelihood of broad community appeal. But that community reaction is always hoped for in legal informational picketing.

Employer clearly appears to have better part of the factual argument that SAFE, as an organizational unit name in which much of the picketing was to be conducted, was in fact little more than a separate checking account that was arranged by the Charleston Building Trades Council's business manager Bobby Thompson, who ostensibly had agreed to serve as SAFE's cochairman, but who was in substance and effect to serve as SAFE's principal manager, much as he was the manager of the Charleston Building Trades Council.

Bobby Thompson was amongst the group of individuals who met in September 1989 and who formed SAFE, an unincorporated association. On designation by a unit group that is not adequately identified as independent, Thompson chaired the first meeting of SAFE, ''just as soon as Brown & Root went in [the Rhone-Poulenc] plant'' (Tr. 2985; R.

Exh. 380(a), pp. 26, 58). The group urged Thompson contact the Reverend Gilmore and request that Gilmore agree to serve as a cochairman of SAFE. Gilmore had no affiliation with organized labor, but was long affiliated with the Institute group, People Concerned About MIC. A few days after the initial meeting, Bobby Thompson made the contact.

Employer argues, and I find Bobby Thompson wanted to get the MIC group at Institute involved in SAFE (R. Exh. 381, p. 27); and, he told Gilmer that Rhone-Poulenc would be operating the less safely after Brown & Root came on the job because Brown & Root would use nonunion employees who would be less skilled than union laborers (R. Exh. 381, pp. 31–32). Gilmer affirmed SAFE was to focus on Rhone-Poulenc's hiring of out-of-state nonunion and allegedly ''unskilled'' Brown & Root to perform plant maintenance work that was unrelated (R. Exh. 381, pp. 31–32; 1603, 1618, 2984–2985; and R. Exhs. 1 and 109). Gilmer then agreed to support SAFE, ''if [Bobby Thompson] was going to focus on safety.'' But Gilmer also understood Bobby Thompson's objective as SAFE's cochairman was to ensure that employment in the Kanawha Valley would not decrease in any way (R. Exh. 381, pp. 34, 36).

Gilmer did not attend SAFE meetings thereafter; nor did Gilmer picket at the Rhone-Poulenc jobsite. Neither Thompson, Fisher, or McCormick, nor any other Boilermakers union official attended any of the MIC group's meetings; nor for that matter did many, if any, named Boilermaker discriminatee applicants attend SAFE meetings. Charleston Building Trades Council, however, through SAFE, sought to make common safety and environmental cause with at least the principals of the local MIC group(s) with regard to Brown & Root's safety record, with particular assertion of it hiring certain unskilled employees.

SAFE is an acronym for Safety and Fair Employment. SAFE had no membership records; nor did it keep any attendance records of its meetings. Though it is established (e.g., from McCormick, who attended *one* of the planning committee meetings, that there were several people from the Rhone-Poulenc plant as well as a college professor serving with Bobby Thompson and other members of the building trades on the planning committee, the fact is the evidence on such is skimpy, and SAFE not only kept no steering committee records, SAFE kept no attendance records even when it publicized in 1990 that meetings were being regularly held on certain days and times each week. McCormick testified that he did not take part in the SAFE decisional process; and, there is no evidence to the contrary.

SAFE is not incorporated. It has no governing documents. SAFE had its own telephone number, but it was answered in the (Charleston) Building Trades Council's office. SAFE had its own stationery, but that was kept in Thompson's office. Safe's address was in substance and effect the same as local Council.

Bobby Thompson directed SAFE's activities. He did the research, and/or collected the information being received from all over the country on Brown & Root's work and safety records, from which he (in general) prepared SAFE's literature that was critical of Brown & Root's safety and work record; and, he also hired a consulting firm to assist him in research and publication matters. Gilmer's role as ostensible cochairman of SAFE was merely to lend his standing or position of influence in the community (to support SAFE), and, Gilmer otherwise essentially let Bobby Thompson handle SAFE operations. Gilmer did not effectively review SAFE's literature and advertisements that were to be published, nor arrange for its distribution or broadcast. SAFE paid all the expenses of the publication of same from funds it collected.

SAFE had no treasurer as such. SAFE's checks were jointly signed by Bobby Thompson and by Fisher. Thompson signed for SAFE's receipts. Fisher also on occasion signed for SAFE's receipts (as did Thomas, once, in March 1990, thus after Thomas was employed full time as a coordinator by the WVA Building Trades Council, with assigned duty to assist (materially) Charleston Building Trades Council), though Fisher (and Thomas) had no position in SAFE. There is some, but relatively limited factual dispute over the sources of SAFE's financing, with Employer asserting SAFE's only source of financing was the contributions received from building trades unions and union members. The Union countered that Employer's reliance on an assertion SAFE was largely financed by labor groups, with cross-assertion that the fact remains that SAFE was financed in part from outside the labor community. It appears Boilermakers International principally relies on donation of a local contractors association (Tr. 2169).

Be that as it may, in light of the weight of all of the above evidence, a clear showing is made by Employer of the essentially strong union base in both initial and ongoing financial support of SAFE that was generated by Charleston Building Trades Council and affiliated unions (albeit it with contemporaneous strong cooperative statewide support generated also by the WVA Building Trades Council, and its affiliates). But it is with the evaluation of Thompson's (and Fisher's) power of the purse, that there can be no real question that SAFE was in essence not an independent organization, but rather was, as the Employer has essentially contended it to be, little more than an established banking account for the collection and accounting of financial support being generated by the Charleston Building Trades Council, and its affiliated members (as assisted by State Council and affiliates), and thus in essence an instrumentality of the Charleston Building Trades Council, in a fight back program that Boilermakers Local 667 (and its International) chose to substantially financially support.

Moreover, on the clear weight of credible evidence above, and especially in the absence of any contra-indicating chartering, or governing documents, or any steering committee and/or attendance records such as to warrant a contrary conclusion, I find that SAFE was an unincorporated association which, though financially supported broadly, i.e., by unions (and others) in the State beyond the Charleston Building Trades Council, and even if in minor part by some local communities and/or nonunion entities, was in origin and basic function an alter ego of Charleston Building Trades Council, in that SAFE was initially created and managed by the same individual who has managed Charleston Building Trades Council; and, it was initially and centrally supported by broad assessment of that Council placed on its affiliates, and was accepted by them.

Accordingly, I conclude and find, SAFE was an adjunct of the Charleston Building Trades Council, created for purpose of publicizing and/or attacking Brown & Root's safety record in a labor dispute, rather than to function in its own right as an independent organization of the local affiliated labor

unions in association with others and designed to inform the community on safety and environmental concerns generally. In short, I find SAFE has functioned as an instrumentality of the Charleston Building Trades Council's fight back program and that it was utilized by that organization in what I further conclude and find was a developed labor dispute that Charleston Building Trades Council and its member affiliates had with Brown & Root. But that finding does not by itself preclude that the Charleston Building Trades, and Boilermakers Local 667 in particular, had any the less real concerns on safety issues with Brown and Root's recent contract award at the Rhone-Poulenc plant, that included ongoing maintenance work assignments in a potentially deadly chemical plant operation.

The General Counsel and the Union have better part of the argument that picketing and handbilling was conducted primarily on safety and environmantal issues associated with publicizing Brown & Root's past safety and its work record, where Brown & Root was not only awarded the contract to perform certain construction, but was given effectively an open ended maintenance contract to be performed in a potentially dangerous local MIC plant environment.

On this record, it is clear safety and environment were a long standing major concern and interest to all in the Institute community in particular, and to inhabitants of the Kanawha Valley in general, where a number of chemical plants are located, but of which, a safe operation of the former Union Carbide, now Rhone-Poulenc chemical plant at the Institute community reasonably appears to have come to be viewed symbolic, because of a combination of factors such as its potentially dangerous production of a deadly chemical MIC, in combination with the occurence of the related Bhopal tragedy in 1984, the Institute plant's (other) dangerous leakage in 1985, now only focused on moreso by environmental groups, independent of involved unions, because of other maintenance-contractor related explosions in Texas in 1989, and the recent contractor award to Brown & Root that did include maintenance work in a dangerous chemical producing plant, and, now most recently, an incident of actual 1990 MIC leakage, during certain maintenance activities.

The record establishes the Rhone-Poulenc chemical facility in Institute, West Virginia, was (at least) the only other facility in the world (aside from the Union Carbide plant in Bhopal, India, if currently operational), which has produced the deadly gas MIC (Tr. 1122). World awareness aside, it was common knowledge to people in the Kananwha Valley that a single leak of this gas in a sister plant in Bhopal had killed thousands of people who lived near the Bhopal plant. The facts of the Bhopal tragedy that occurred on December 2–3, 1984, were recently re-memorialized to residents of Institute and its surrounding communities, in a TV newscast of a SAFE related rally held at the state capital on December 3, 1989, on the fifth anniversary of the Bhopal tragedy.

Charleston Building Trades reasonably would have known that its expressed safety and environmental concerns as related to Brown & Root when raised would have an initial local and later broader appeal; and, that is what effectively happened over time. Norman Steenstra is currently employed as environmental director of West Virginia Citizen Action Group, which is both the oldest and largest citizen advocacy organization in the State of West Virginia. Steenstra is also vice president for state affairs (a volunteer position) of the West Virginia Highlands Conservancy, which is the oldest purely environmental group in the State. Steenstra is also founding member, and presently on the board of directors, of the West Virginia Environmental Council, an umbrella organization of all environmental groups in the State. Steenstra has testified credibly concerning his own involvement with environmental groups, and their related demonstration activities at the Rhone-Poulenc plant, in conjunction with the Institute community, including local unions (Tr. 5141–5142).

Steenstra testified he first got involved in the Rhone-Poulenc activities through a local Institute, West Virginia group called People Concerned About (or With) MIC, and a professor at West Virginia State College that is located adjacent to the Rhone-Poulenc chemical plant facility. Steenstra was involved with this local MIC group long before the Union Carbide Institute facility was a Rhone-Poulenc plant (Tr. 5143–5144). Steenstra has also testified credibly that environmentalists became more focused because of 1989 plant explosions in Texas, that admittedly did not involve Brown & Root, but had no less caused them all to be more focused and concerned with a contractors' performance of construction that would lead to performance of maintenance work by unskilled labor (a matter Steenstra related he is now pursuing with certain legislation preparation, but not yet a bill introduction), and also, by what they came to perceive as Brown & Root's poor safety record (Tr. 5156–5157; 5159; 5164–5165).

Admittedly, Steenstra had not picketed (with the other environmentalists), at Rhone-Poulenc (as he recalled) until late December 1989, or early January 1990 (Tr. 5144). Starting from a time earlier than that, however, Steenstra had attended two (probably SAFE) meetings of about 25–30 individuals at a union hall, I find probably in early to mid-December 1989, but more likely following the December 3, 1989 State Capital Bhopal anniversary rally. Steenstra also recalled that he thereafter began receiving more and more information on Brown & Root's (purported) poor safety record that increasingly concerned him, though he readily acknowledged that he had not made a comparison of any construction company's safety records on basis of the contractor's relative size. Steenstra explained, being unfamilar with available labor sources in that area, he did not know where to get the information.

Local community environmental groups (and their members) were present at the Rhone-Poulenc picket line on numerous occasions, including through their activities, or interests, a few named Boilermakers. E.g., Blue, who was previously active in a halt out-of-state garbage committee, was present at its rallies at a time SAFE was; and, Blue recalled that after one rally ended, they went together to Rhone-Poulenc to picket, she through member talk, and not by union official direction (Tr. 1349–1351; 1363). Similarly on pollution, *Butcher* recalled that he and relatives, and others, had participated in environmental affairs that were directed against Rhone-Poulenc at the capital on that account (Tr. 3052). More directly plant related, *G. Walker* has recalled presence of his wife, children, and some nonunion neighbors at the lower (Brown & Root) gate (picket line), because they were all concerned about local plant safety and to ensure Brown & Root's hire of qualified workers there (Tr. 3070–3071). Skeens has testified on presence of crafts, environ-

mentalists, and people he recognized from Institute and the surrounding communities of Cross Lanes and Dunbar there (Tr. 3468). Even Johnson has acknowledged that on occasion Johnson saw (a few) employees of Rhone-Poulenc picketing (seemingly) at Rhone-Poulenc's main gate (Tr. 3108).

A major rally of environmentalist groups, that included SAFE, was held at the state capital on January 20, 1990. Though SAFE participated, and the rally registered a concern over the Rhone-Poulenc facility, the rally itself was an initial gathering of various environmentalist groups throughout the State, some 50–55 in all, with some 800 people in attendance, of which Steenstra has in the end estimated only 110 to 150 were union members. The rally was more addressed to the effect of Rhone-Poulenc operations on the environment.

Some national environmental figures, however, state politicians, and the local environmental groups were present (Tr. 5144–5148). It does appear that in conjunction with that broad based rally at the capital, a rally was held later that day at the Rhone-Poulenc main gate by some of those same people in earlier attendance at the state capital rally, and at which Lois Gibb (of Love Canal fame) was (again) featured speaker. Photographs of the rally and of (alleged) pollution existing around the Rhone-Poulenc plant were later featured in an environmental book (Tr. 5149–5150; C.P. Exh. 23).

Local area concerns on plant safety understandably heightened on February 2, 1990, when a MIC leak actually occurred at the Rhone-Poulenc plant facility. Some Brown & Root employees were exposed. Many individuals first heard on the radio and read in the newspapers (only) that the MIC leak had occurred and that several Brown & Root employees had been injured. There was shortly thereafter a related increase in picketing. Some people picketed the main gate (as well as Brown & Root's gate) protesting Brown & Root's presence.

Rhone-Poulenc, in time, responded publicly, informing the public Brown & Root was not at fault. But that did not end concern over matters related to the production and handling of MIC, and the other dangerous chemical products and gases that are produced/used at the Rhone-Poulenc plant. (When the same community was later notified of a DuPont competitive award of a contract to Brown & Root, the article also assuaged the public's concern with additionally reported statement that Dupont's own safety officials would monitor their project's safety considerations.)

McCormick has thus testified with much corroborative background, and thus credibly so, that residents of Institute and nearby local communitites in West Virginia had becomed concerned over the production of the MIC chemical so near their homes soon after the Bhopal tragedy (Tr. 2167), as was he. He recalled that a local community group was first formed in 1985 to voice the community's concerns about Rhone-Poulenc's (Union Carbide's) handling of methyl isocyanate or ''MIC'' after a leak at the plant similar to 1984 Bhopal accident (Tr. 3915, R. Exh. 381, p. 13). (Apparently that initial local group was called Institute Community Against MIC, if McCormick has not here simply misidentified People Concerned About (or With) MIC group presently there. The latter group makes the point it is not against MIC production, but concerned about MIC's safe production. The record reflects the leak at Institute in 1985 was of a dangerous substance other than MIC, but one in nature, and with effects there, such as to mobilize the same safety concerns then. The above MIC safety group (or present People Concerned About MIC), focused on Rhone-Poulenc's handling of dangerous chemical(s), and its reporting of leaks to the community.

There is some confusion in the record as to the names of various safety community groups concerned with safety, but not that there were several such groups, or that the largest of them, community safety assessment committee(s) (CSA), as credibly identified above by Respondent's witness Blashford, is (are) substantial. The local CSA meets regularly; and, its membership was not only inclusive of representatives of the involved and affected business community, but of representatives of certain smaller but preexisting local environmental groups, and specifically, e.g., Pam Nixon and Mildred Holt, who were members and representatives of People Concerned About MIC (with whom the Reverend Paul Gilmer, a leader in the Institute community, was long associated, thus long before Bobby Thompson urged Gilmer to support SAFE, and to lend his name as cochairman of SAFE).

McCormick testified he understood the SAFE group had been formed because of local concerns over safety and environmental issues (Tr. 2087–2090); and, he testified that as he understood it the primary purposes of SAFE was to provide a safe work environment (Tr. 1601–1603; and 2168–2169). McCormick knew there were other members of the planning committee of SAFE, besides the members of the (Charleston) Building Trades Council, or the Boilermakers Union, naming the professor of the local college that is adjacent to Rhone-Poulenc's Institute Plant. A certain state politician, whose husband is an official of the local union contractors' association, was (at least) supportive.

And in agreement with Employer, however, I conclude and find, that on the basis of the financing of SAFE, and contemporaneous documents being ongoingly generated by the WVA Building Trades, and by Boilermakers Local 667 internally, in regard to financial and other urged support of SAFE and/or the Building Trades Council, that both these union organizations understood well that SAFE was centrally a financial instrumentality of the Charleston Building Trades Council when it came to joint fight back picketing efforts.

But again, this still does not mean that the Charleston Building Trades unions and their members were not genuinely concerned with the community safety issues being raised. McCormick who lives 6 miles from the plant, has testified plausibly he was concerned for his family about the plant's MIC production; that he wished the MIC plant were not there, but he recognized that it is; and he cannot do anything about that (Tr. 1122). McCormick testified relatedly, and also not implausibly, he picketed Brown & Root at its Rhone-Poulenc jobsite, because, ''We were concerned citizens to [sic] try to get skilled people on the job and make a safe environment because of the MIC unit there.'' McCormick testified further, they picketed there, because, in his opinion, Brown & Root was hiring unskilled people; we checked Brown & Root's safety records; we were concerned about that; and we did not want it (what happened at Bhopal or Texas) to happen at Institute, West Virginia.

McCormick was early well aware that of 46 skilled Boilermaker applicants that he had effectively authorized to apply for work at the Brown & Root job in the first week, prior

to any staffing, not one had been hired. To the extent, however, McCormick has asserted he had urged his members to participate in SAFE's community safety activities, which he viewed as nothing more than being a good citizen, I have grave reservations on full acceptance of that, and I simply do not credit the assertion. Rather I am persuaded and I find that he had done both. From the outset, he urged his members to support the Charleston Building Trades Council's fight back program against Brown & Root that the Charleston Council decided was to be conducted on the basis of Brown & Root's safety issues. They were to do so by their participation in picketing activities at the Rhone-Poulenc jobsite. But he had also sought as promptly for his union to man the job with well qualified applicants.

Thomas relatedly affirmed he picketed outside the Rhone-Poulenc jobsite of Brown & Root, but (I find) on occasion, probably at the main gate, to inform the public of what he then felt was an unsafe condition inside a plant that was one of only two in the world that produced the deadly chemical MIC. Thomas has testified (I find plausibly, and consistently) that he applied for work there, and he urged other qualified boilermakers to do so, because the alternatives (to him) were: to let things go as they were, and accept what we felt was a contractor who would hire inexperienced people, or, to bring their own (known) safe work experience to the job by applying for work there, along with an idea of organizing the others, getting them some training; and, thus seeing to it that they were (all) qualified to do the job. Thomas was clearly not alone in these asserted views, and intents. The named-applicants almost to the man corroborate, with but credible individualized variations, but picketed gate C.

It is convenient in addressment of the varing nature of that corroboration to simultaneously address picketing activity of discriminatee-applicants to evaluate illegal picketing forfeiture claims based on Section 8(b)(1)(A) type conduct, and address (first) where convenient, any asserted job loss claim that stemmed from asserted individualized conduct or activity of a type that would be in violation of Section 8(b)(4)(i) and (ii)(B).

In the comparatively few instances where an applicant witness testified clearly that the witness (or another) has picketed at Rhone-Poulenc's main gate (or another gate other than Brown & Root's gate C) every attempt has been made to as clearly so state. Otherwise, and which is the case by far more usually, all present references to applicants picketing at the Rhone-Poulenc plant, or facility, are made to the applicants picketing at Brown & Root's gate C at the Rhone-Poulenc facility, even if on occasion not presently explicitly so stated. The following accounts of the discriminatee-applicants are also deemed adequate to assess the nature of the individual applicant's picketing, and to but further corroborate that safety was a real concern of Boilermaker Local 667 discriminatee-applicants, but not at all so as SAFE members.

Asbury, who lives within a mile of the Rhone-Poulenc plant, testified he stood in protest (picketed) three–four times. Asbury went to no SAFE meetings. He was not sent to the picket line, but went there on his own, though as a result of talking about it with his friends. Asbury was concerned because there had been a newspaper article about Brown & Root's unsafe practices. Asbury has testified, he did not know if Brown & Root was safe, or unsafe; but, from having lived there 25 years, to his knowledge, Brown & Root had not worked in there before, and, Asbury just wanted to make sure that new people (working) there, were trained and adequate. Asbury testified that he was sure that was a safety issue in the mind of everyone in the Valley. Asbury explicitly denied that he had picketed because Brown & Root was a nonunion contractor, declaring that had nothing to do with it at all. Asbury essentially reiterated it was a matter of the safety of his home, family, and neighbors. Asbury did not engage in any 8(b)(1)(A) type conduct in his picketing; nor recall ever personally carrying a sign. He is not shown to have engaged in any 8(b)(4)(i) and (ii)(B) conduct, other than what Employer may show based on his having engaged in picketing that is shown conducted by the Union with a secondary object, or shown so illegal by the conduct of others, and/or by other evidence.

Some discriminatee-applicants picketed both before and after they applied, though most after. *Barker* picketed a dozen times at Brown & Root's gate C, that he testified probably occurred before and after he applied on September 25, 1989. Barker first recalled the picketing occurred over a course of 3–4 months, but that (I find) more probably, in his instance, had extended over even longer period, as Barker later recalled his picketing occurred in the winter and spring. Barker, who did not participate in SAFE activities (other than the picket line) recalled that he, and other pickets, carried signs that had SAFE on them, and that said different things. Barker recalled some signs with a skeleton had said, *Do You Want Your Family To Look Like This*.

Though Barker has (candidly) acknowledged they talked about attendance on the picket line at union meetings, Barker also testified credibly that he went down there by himself. Barker explicitly denied that one of the reasons he was picketing was because Brown & Root was nonunion. Barker did not engage in any 8(b)(1)(A) type misconduct in his picketing. (Employer's contrary urging that Barker has forfeited any employment right he may have had because he had sworn at a guard (Tr. 1865), where the occasion he swore at the guard was shown to be because the guard had taken his picture (Tr. 1871), is without merit.) Nor is Barker shown personally to have engaged in any 8(b)(4)(i) and (ii)(B) type of misconduct, other than what Employer may show is based on Barker having engaged in picketing, e.g., such as may be again shown secondary by conduct of others, or other evidence, as urged by the Employer under the certain Board precedent, addressed below.

Blue, who was long independently active in environmental affairs, picketed four–five times. Blue recalled she carried SAFE and/or environmental signs, e.g., *''Citizens For A Safe Environment.''* Blue recalled other environmental signs in use were, *Stop Pollution*; and, *Stop Destruction of Our Environment*, etc. Blue testified generally that they (seemingly SAFE) had tried to educate the public on the safety record of the contractor (Brown & Root) that was doing the work. Blue acknowledged that on occasion she had walked across a gate, but there is simply no evidence presented that she ever blocked a gate. Thus, Employer's contention Blue has forfeited any employment right she may have had because she blocked access to a construction gate in a manner violative of Section 8(b)(1)(A) is simply too strained, and without merit. *Moore* (Blue's sister) has recalled picketing twice, both with Blue, but after Moore filed application on September 22, 1989. Though Moore did not recall what the sign that

she carried had said, neither is there any evidence presented herein that Moore, or others (other than as stated herein) carried any one of the urged secondary-message signs.

Butcher and Cashdollar. *Butcher* related he picketed three times at the gate ''furtherest down the river'' (thus gate C) recalling he did so two times before he applied on September 20, 1989 (thus on September 18 and 19), and once thereafter, and more likely before urged Section 8(b)(7)(C) period. Butcher also attended the rally at the state capital, that he has recalled was on the environment, and more against Rhone-Poulenc (probably January 20, 1990). He has also described generally an occasion when he saw a number of environmental groups present; and, he also saw women and children there who lived in the area.

Butcher initially went to the picket line in response to McCormick asking if he could (on occasion I find most likely prior to his first picketing on September 18, 1989). Butcher saw signs that had said something about Brown & Root's record of ''poor workmanship, craftsmenship, or something;'' and some signs about the (Bhopal) India plant; but he did not think he had seen a sign that said, ''Give the Boot to Brown & Root.'' Butcher, who picketed at Brown & Root's gate C expressly denied he was picketing to get rid of Brown & Root.

Cashdollar also picketed three–five times, similarly at the lower gate, and similarly both before and after he had applied on September 20, 1989, adding, it was an ''informational picketline'' informing the public they were picketing over certain unsafe practices by Brown & Root. Cashdollar's apparent recantation, however, of initial testimony union officials had asked him to participate was not convincing, and is not credited. But that does not detract from his other testimony which is well corrorated otherwise.

On the record before me, *Dew, Fisher, Gerlach, Morris, and Sprouse* picketed probably during the material early to mid-October period that the Employer has offered much 8(b)(1)(A) evidence on, *but not likely in 8(b)(7)(C) period*. Dew picketed two–three times, *probably within 1 month* and not longer than 2 months after his application (on September 25, 1989). Dew understood that they were protesting that Brown & Root was an unsafe contractor. He believed they were unsafe; he had a right to picket to inform the public; and, he thought it was the right thing to do. By picketing Dew hoped to stop unskilled labor from working there. *Fisher* picketed about six times that he recalled were all after Fisher applied on September 21, 1989, but *within a few weeks*. He did so on his own. Fisher was concerned about Brown & Root's safety because of what he heard about Brown & Root's past work record, recalling (consistent with record) they made bad welds at a nuclear facility; and, he was protesting because of his concern about the community and himself.

Gerlach picketed once, but *1–2 weeks after he applied* (on September 21, 1989), and on his own, though with another (nondiscriminatee) Boilermaker. Gerlach recalled on this occasion he had passed out literature, and information on safety hazards in the plant, and on Brown & Root's safety record, because he was concerned about the plant's safety and environmental aspects, summarizing, they can handle some pretty lethal stuff at that plant. Gerlach explicitly denied he picketed because Brown & Root was a nonunion instructor. *Morris* picketed probably three times, about a couple of weeks after he had applied (on September 25, 1989) around October, and on McCormick request, when Morris had checked the hall about work. Morris recalled it was in the paper, and he had heard by word of mouth in the community that they (Brown & Root) were not safety minded.

Sprouse picketed at the Brown & Root gate C about five–six imes in October and November 1989, on McCormick's request. Sprouse carried a sign twice, which each time said, *''Citizens Concerned About MIC.''* Sprouse was aware of different problems Brown & Root had in Texas. Sprouse explicitly denied he was picketing to get rid of Brown & Root; but rather testified, he was trying to make them safe in the Valley, where he lives, was raised, and was concerned about; and, with his idea being to get contractors to train their employees, just like the plant people do.

There is no specific claim made, nor evidence offered that Dew, Fisher, Gerlach, Morris, or Sprouse had blocked egress or ingress of cars at the Brown & Root gate (or engaged in any other 8(b)(1)(A) type misconduct, or, were involved in any individualized 8(b)(4)(i) and (ii)(B) conduct, other than the Employer's general claim made on basis of their engagement in the picketing that Employer urges is shown secondary otherwise). Thus, though all their testimonies would indicate that they had picketed during material October period before issuance of the TRO on October 16, 1989, finding is not warranted that any of them had individually engaged in any of the alleged 8(b)(1)(A) type misconduct that Employer has offered evidence on.

Lowther picketed twice, also once before he had submitted his application on September 25, 1989, and once after. Lowther recalled that on the first occasion, McCormick had asked him to go to the picket line when he was still working out of town at Shinston, West Virginia. Lowther estimated there were 200 pickets the first time he went. Lowther recalled that on that occasion Lowther carried a sign that said, ''Honk.'' Lowther recalled there were other signs in use, but did not recall what they said; and, he specifically testified that he did not remember seeing any sign that said, ''Boot Brown and Root'' (a denial plausible, in view of the limited occasions that he picketed, and the likelihood he picketed on the first or second day, before Kilburn saw such sign). Lowther also mutually consistently and credibly testified he was picketing to inform people of the safety hazards that could be caused by the inexperienced people doing the work in there. He recalled little about his second picketing occasion (again plausibly, as he arrived in the evening when they were wrapping up). Lowther explicitly denied that he was picketing to get rid of Brown & Root.

Haught similarly picketed twice, in the fall, but both after he applied (on September 25, 1989) his first time with Lowther (and with two other nonapplicants). Haught relates they demonstrated against (picketed) Brown & Root's unsafe work record, use of unskilled labor and (sic, in context, in) a chemical plant that manufactures dangerous chemicals. When asked if he knew any unsafe Brown & Root employee, Haught retorted, he did not direct it (his charge) against an employee but against the Company's unsafe work record; and, he appears to have repeatedly corrected questions put to him about nonunion labor that it (his picketing) was against *unskilled* nonunion labor. Haught carried a ''*Honk Your Horn*'' sign the first time, and none the second time. Combs, who was out of town for the most part, had picketed only

once, or twice, going there on his own, protesting they (Brown & Root) were using unskilled labor in there in building (sic) a dangerous unit.

Marion picketed four–five times over a period of a month when other boilermakers asked him to go, and probably after he applied on September 21, 1989, but he could not recall the dates. Marion picketed on account of newspaper articles and/or reports that he read on Brown & Root's unsafe practices. Though Marion acknowledged that he did not personally know any Brown & Root employee that he thought was unskilled, Marion replied relatedly, that from the articles he read where they had so many safety violations, he took it for granted they (Brown & Root) were probably unsafe in a lot of things. There is no claim, or evidence presented that Marion participated in 8(b)(1)(A) type misconduct, or in personalized 8(b)(4)(i) and (ii)(B) conduct. *Neither Gerlach, Lowther, Haught, Marion, or Sprouse picketed in the 8(b)(7)(C) period that is urged by Employer.*

Dougherty picketed 10–15 times over a 3–4 month period, but all after he had submitted his application on September 25, 1989 (and thus after Pribyl's initial decision not to consider him for hire, or not to hire him). Though Dougherty never carried a sign, he testified initially that the signs carried mostly had to deal with the job was unsafe, and they had unqualified people doing it. On later occasion Dougherty testified all the signs he saw had to do with safety; and, he was on the picket line because he was concerned for the safety of his family and the people in the Valley, and, for no other reason. (*Kelley* similarly testified on his recalled picketing on quite a few times.)

Pinkerman picketed two–three times, after he applied on September 20, 1989, but his picketing was probably spread over a several month period. Pinkerman has testified that he probably talked to union officials, though he did not recall the conversation(s). Pinkerman protested (picketed) to let the public know of unsafe practices and unskilled workers employed by Brown & Root, that he was aware of from newspaper accounts of bad welds, and some explosions in Texas. Pinkerman testified explicitly that it (his picketing) had absolutely nothing to do with Brown & Root being a nonunion contractor.

There are a substantial number, e.g., *Carpenter, Cox, Hale, Jeffers, Morris, Pierson, Prouse, Smith, and Sprouse* who have more clearly indicated that they first picketed after the 10(b) date of October 18, 1989. E.g., *Carpenter picketed three–four times, but he has indicated his picketing started much later, in December 1989 (thus well after October 18, 1989, the 10(b) date). Carpenter added that his extended period of picketing probably ended before a picketing hiatus in early 1990; and, thus it is indicated he did not picket within Employer's urged 8(b)(7)(C) period. Carpenter appears to have recalled that he had initially picketed after* (completion of) his next referral of a job that had lasted until the end of November 1989. Carpenter's next referral in any event was recalled as about a month after his application to Brown & Root filed on September 21, 1989, thus it is also more indicated even on that basis that he first picketed after the 10(b) date.

Carpenter's understanding was that it was Building Trades picketing, not Boilermakers Local 667 picketing, is both revealing, and confirming it was a Charleton Building Trades Council's affiliated unions joint picketing effort in this matter. Carpenter has recalled the sign he carried was something about ''Unfair'' (and I find, probably ''*Unfair Practices*'' as is definitively identified below. In regard to inability to recall the other signs, there is no evidence presented Carpenter had ever carried any of the claimed secondary signs, or picketed at Rhone-Poulenc's main gate.

Though it is unclear how many times he picketed, *Cox* has recalled he did not picket until very late, placing it in the spring of 1990. Cox testified he picketed because of what he read in the newspapers about some of the safety practices of that company (Brown & Root) in the past; and that, because he was down river, if there had been a spill, there was a good chance it could affect his family, as it would the people in Institute, and in Charleston.

Hale picketed about 15–20 times, he thought after he applied (on September 21, 1989). Though he could not recall whether it was few weeks or months later, his other testimony indicates it was more likely the latter (and after October 18, 1989), as he recalled the picket numbers were from 5 to 25–40 *and that it was wintertime.* Hale affirmed he had on occasion walked in front of cars, but Hale has also testified when the cars drove in, he would walk away. Despite evidence that is presented herein showing that some picketing individuals on occasion have indisputably engaged in gate C blockage, there is no showing that Hale ever did. Hale has denied he threw anything. He also denied he has engaged in any other 8(b)(1)(A) type picket line misconduct. There is no evidence presented to the contrary. Nor is Hale shown to have engaged in any 8(b)(4)(i) and (ii)(B) type misconduct other than (again) as is urged generally shown on basis of Employer's argument that Hale engaged in picketing that is shown secondary by the conduct of others, or by other evidence, under certain urged existing Board precedent that is to be discussed below.

Jeffers, a self-identified dedicated union man, testified he voluntarily picketed maybe once a week over a 1–2 month period, but he also recalled *it was wintertime.* Thus his picketing was more likely after the 10(b) date of October 18, 1989. *Pierson* picketed at Brown & Root's gate C about 5–10 times, but *about 2 months after he had applied* on September 21, 1989, in (late) *fall—early winter* (after the 10(b) date). Pierson was aware of what Brown & Root had done in other States, and, he had seen Brown & Root's OSHA records, *which but the more indicates that his picketing would have been in December 1989.* Pierson went to the picket line (at Brown & Root's gate C) on his own (but with others) to let people know we were fighting for safety. Pierson (only) testified a part of his reason for picketing was because Brown & Root was a nonunion contractor. But Jeffers only picketed at gate C.

Prouse picketed at Brown & Root's gate C six–eight times after he applied on September 21, 1989. Though he could not recall how long after, he estimated *it was 1.5 to 2 months*, thus, at the earliest, *the more likely in November 1989* (and after October 18, 1989's 10(b) date). On occasion Prouse saw McCormick, Lovejoy, and Thomas at the (Brown & Root gate C) picket line. (Reference of Prouse otherwise to accidents then occurring is too indefinite to place all his picketing after the February 2, 1990 (MIC leakage and Syngas) incidents. *Smith* had picketed 2–3 times but *not until mid-December* after being laid off (and thus well after October 18, 1989).

C. Walker picketed twice at the Brown & Root gate that he recalled as part of a community informational picket line concerning safety of the work being performed by Brown & Root. Each time he carried a sign that was something about safety, as were the other signs that he recalled seeing. But G. Walker, who signed his application on November 23, 1989, could not recall whether he had picketed before or after that.

G. Walker (I find) picketed twice at the lower gate (Brown & Root's gate C), as he recalled within 2–3 months after he applied on September 19, 1989, in late 1989, but more likely (at least) on second occasion occurring after the MIC leak. G. Walker relates his wife and children were on the picket line, as well as several of his neighbors from Dunbar, but whose names he did not know. G. Walker and wife went there on their own, as a safety protest, as he thought they were not hiring qualified people, but rather were hiring just anyone, and complains they had done so while not hiring him. In that regard, G. Walker testified that he thought he had a lot more experience than those being hired. Though he did not have the names, G. Walker recounted he spoke to Brown & Root employees about safety issues, who told him about use (or nonuse) of certain safety equipment; and, he asserts he was told that people doing the job were like on-the-job trainees. (*R. Wallis* picketed 1–2 times at Brown & Root's gate C when asked by a fellow employee to help support the effort to show people about Brown & Root's safety record.)

Webb picketed three times at Brown & Root's gate, he thought after he applied on September 19, 1989, but was not sure. He picketed at the Union's request, to let the community know about the job. Webb carried a sign once that said, *''No More Bhopal.''* Webb testified, however, that he went down because he thought it was helping him. Webb explained he did not know about the safety of the job, because he never got on it, but he was protesting that out-of-state workers was (sic) taking his job. Initially, Webb recalled generally there were a lot of other signs, about Brown & Root's prior unsafe work practices, but he did not recall them. In re-examination, Webb affirmed he saw signs there that said *''Brown & Root Unsafe Contractor''* and *''Give Brown & Root The Boot.''* Webb was also present on one occasion when there were about 100 pickets. Webb testified, however, that on that occasion they stood on both sides of the road, and never blocked the gate. Webb explicitly denied that he ever walked in front of cars as they came in. There is no evidence presented he did. (Wise picketed once, in January 1990 (thus after the October 18 10(b) date, and before the 8(b)(7)(C) date relied upon by the Employer), when Bush asked if he could do so that day. Wise carried a sign, but could not recall what it said.)

In summary, on close analysis, Employer has not made out any 8(b)(1)(A), or any individualized 8(b)(4)(i) and (ii)(B) defense on any of the *above* discriminatee-applicants, with the urged exception that Pierson has done so by admitting that part of the reason that he had picketed was because Brown & Root was nonunion. But Pierson's motive is not dispositive. His conduct is.

Employer's major contentions on individual applicants in this area appear to be limited to alleged 8(b)(1)(A) picketing circumstances of *Jim Hudson Sr., Donald Mosteller, E. Mosteller*, and *G. Mosteller* whom Employer has claimed are identified as having blocked egress at Brown & Root's gate C; and individualized 8(b)(4)(i) and (ii)(B) conduct on the picket line by applicants *L. Johnson* and *Templeton*, in picketing at a neutal gate.

Employer would rely on Hudson's own account of his conduct in this area. Hudson testified he did not block traffic in the sense of shutting traffic all together. Hudson has testified that if you slow walk in front of a car that is trying to exit and it takes them a couple of minutes for you to clear the area, that is not blocking traffic. Hudson affirmed that he did slow walk in front of cars exiting the Rhone-Poulenc plant at the Brown & Root gate such that it required those cars to stop *for a minute or more*. He could not give a date. Hudson otherwise testified that he never stopped a vehicle from going in or out of the Brown & Root gate at Rhone-Poulenc; that he was never arrested at any time on the picket line; and that no one gave him a ticket or a complaint of any sort for blocking traffic.

Hudson has otherwise testified that he picketed on 15–20 occasions (and he had on probably even more occasions, as he later testified it was 20 odd times, and both at start and close to the end). All incidence of his picketing was after he filed application on September 21, 1989. Hudson related that his picketing had extended possibly in October, November, and December, but was probably moreso earlier, and I so find (especially since he worked 3 weeks in December 1989).

Hudson recalled carrying two–three different signs; and, Hudson has specifically recalled carrying signs that had said, *''Remember Bhopal''* and *''We Want Safe Workers Working In The Brown & Root Plant.''* Hudson testified that his only objective in his own picketing was to carry a safety sign. Hudson otherwise testified generally that all the signs he has carried were safety oriented.

Hudson also testified that by carrying the signs (and picketing) he hoped to have safe people in there doing the work, by effecting Brown & Root's hire of qualified people to do the work. In that regard, Hudson has affirmed on Employer's questioning, it would have been a good thing to discharge all the existing (Brown & Root) employees, and hire the people on the picket line that he considered to be safe. Hudson testified that he understood Brown & Root was not safe; first asserting they hired off the street; and, when then unable to identify any unskilled Brown & Root employee so employed, asserted there were a lot of articles, and SAFE literature (on it). With regard to his own employ, Hudson testified that he was a safe worker, and he could absolutely control the safety of any crew that he worked with.

Employer would rely on an additional incident of alleged Hudson picket line misconduct. Brown & Root Personnel Manager Johnson has testified to an incident that he observed, but that he could not later find on videotape. The incident was an occasion when a picket with a cane on the picket line struck a vehicle. Johnson described the picket as standing at the very edge of the driveway, where he usually did, and where you had to make a sharp turn to either get in or get out. The driver of a long flat bed came up and pulled his truck around *close to the picket*. Johnson did not think the truck had actually touched Hudson, but he reported it as (and I find it was uncontestedly) *pretty close to the picket. Notably, Johnson also described it as a lot closer*

than most of the other people came, because it was a long bed truck.

Johnson recounts that the picket on that occasion had picked up his cane and hit the (front) hood of the truck with it; and, as the picket did, the picket called the driver a fuck'n wet back. Johnson, who had observed the incident from the security trailer, promptly viewed the truck for damage with the driver. Johnson found that there was no damage to the truck. The truck itself was old, a 70's flat-bed model (Tr. 4867). Johnson, who saw the whole incident, asserts that he could not say if Hudson's action was a reaction to the closeness of the vehicle to him, or not. The matter was not abdressed in the examination of Hudson; and, he was not recalled as a witness to address it.

The picket had not been initially identified by Johnson (or Thorn) in the the manner that had theretofore usually proven acceptable between the Parties herein, e.g., a noncontested hearsay source deemed reliable (e.g., newspaper, TV newscast, etc.). On Johnson's investigation, Johnson had not been able to find the incident recorded on any videotape, nor was his testimony convincing of a nonhearsay identification (compare Tr. 4861–4863; and Thorn Tr. 4572–4579).

Employer, however, observes in reply brief (app. 22.) that with respect to unlawful conduct of specific organizer-applicants, Charging Party admitted Hudson struck an employee's truck with his cane while the employee attempted to drive through the pickets. Charging Party Boilermakers relatedly stated,

> [5] Although one applicant did strike a truck with his cane, he did no damage to the truck. This does not constitute sufficient misconduct to justify the Respondent's refusal to hire the applicant. *Massachusetts Coastal Seafood, Inc*., 293 NLRB 496, 536 (1989).

Employer contends Hudson's striking the truck of a Brown & Root employee is sufficient misconduct to warrant a refusal to hire. See, e.g., *PRC Recording Co*., 280 NLRB 615, 616 (1986) (rejecting administrative law judge's finding that a striker's conduct in hitting the hood of an employee's car with a large stick was excusable, and finding instead that the striker's action was ''clearly misconduct that would reasonably tend to intimidate an employee under the existing circumstances''). Employer argues whether Hudson succeeded in damaging the employee's truck is irrelevant. Under *Clear Pine Mouldings*, 268 NLRB 1044 (1984), all that is relevant is whether Hudson's misconduct reasonably tended to coerce or intimidate employees in the exercise of their Section 7 rights. Employer has further contended that *PRC Recording Co*., supra, acknowledged the obvious: striking someone's vehicle with a cane or large stick reasonably tends to coerce and intimidate. In addition, discriminatee Hudson has admitted to other misconduct, including slow-walking in front of Brown & Root's gate several times (Tr. 747). Hence, Hudson's conduct violated Section 8(b)(1)(A) and (4) of the Act, causing him to lose the Act's protection and preventing him from being able to assert a failure-to-hire charge against Brown & Root.

Although I tend to agree with Respondent that it is not the accident of any resulting damage to a vehicle that is the criteria of whether an act is engaged in that reasonably restrains and coerces employees, I do not agree that the fact that there is no damage to the vehicle is irrelevant, as from that fact fair inference may be also drawn with other attendant supporting circumstances, it was not a planned, or reasonably foreseeable event, but a '''reflex reaction' after [an employee] was nearly struck by a vehicle being driven in across the picket line in a dangerous manner.'' *Massachusetts Coastal Seafood*, supra, 293 NLRB at 536. Here, Hudson did not bring a big stick to the picket line and use it, but a walking cane. Moreover, there is no evidence presented that Hudson did not have physical need for the cane, and/or that he had brought it there for use as an intimidating weapon. Indeed the record more supports the contrary. If the weilding of a cane in the manner described has potential of intimidating other employees, it seems to me so does a working employee driving a long bed truck through a picket line too close to a picket. Johnson, who observed the incident, could not tell if Hudson had merely reacted to uncontested closeness with which the truck had been driven to him; and, neither can I on this record. I shall not rely on this incident, *Massachusetts Coastal Seafood*, supra.

That Hudson has effectively admitted engaging in a pattern of regular blockage of vehicles for 1–2 minutes, or, however, in light of general evidence herein, warrantedly inferable (at least on occasion) likely longer, is another matter. In my view, Hudson has admitted to engagement in conduct of a type and manner that is likely to have restrained and coerced employees who may have been victimized by it. But it is equally clear on this record that Employer did not rely on such conduct when it decided not to consider for hire, or hire Hudson Sr. (and the others) on September 25, 1989.

The Mostellers. Employer's evidence on the Mostellers essentially rests on the testimony of Employer's witness *Teddy L. Bragg*. Bragg, *who notably was not hired until October 10, 1989*, and who knew Donald Mosteller, E. Wayne Mosteller, and also Gilmer Mosteller from church, initally testified (only) that he had seen the three Mostellers on the picket line (Tr. 3404–3405). Bragg, later testified (only) that on a day in October, in the evening as Bragg was leaving work Bragg had to drive by Wayne and Gilmer Mosteller standing there on the picket line (Tr. 3407–3408). He related that Donald Mosteller was on the picket line on two other occasions, in October and November 1989.

Bragg subsequently related they stood in front of his vehicle; and they had to step aside for him to get past them, but then reaffirming that they were all walking back and forth across in front of him and everyone else trying to get and (sic, in context in and) out of the plant, but then adding that all three Mostellers had blocked him in October 1989; Wayne and Gilmer on one day, and, Donald Mosteller on another (Tr. 3413).

But Bragg next reaffirmed that Wayne and Gilmer Mosteller walked back and forth across in front of vehicles coming out of the plant in the evening; and retrenched with assertion that the only thing that the Mosteller's (sic) did that Bragg did not like is that they walked in front of his truck (Tr. 3414); only then to assert that he did not talk to them at church from that point on, because *they were trying to prevent Bragg from working and making a living*. Bragg then explained that (essentially) he had concluded that they were trying to prevent him from making a living, *because they were obstructing him from getting in and out of work* (Tr. 3415). Bragg acknowledged and/or reaffirmed that none of

the three Mostellers had thrown cheese on his vehicle; nor did they curse him; or strike his vehicle; or cause Bragg any damage whatsoever. Bragg then repeated the only thing he did not like was that they walked in front of his truck. I only further note it was apparent to me that on occasion Bragg had became overly defensive in responding to the union counsel's questioning.

D. Mosteller and E. W. Mosteller had earlier testified. *D. Mosteller* has picketed more than 10 times, extending from the period of September 1989 to May 1990, but also more so towards the beginning, though only after he had also applied on September 21, 1989. D. Mosteller testified that the signs he carried had said, ''Honk, or, Blow your Horn If You Support Us.'' D. Mosteller also recalled that he was not working when he picketed. D. Mosteller also testified that he picketed because he, ''thought maybe if Brown & Root would leave out of Rhone/Poulenc he would have a job, since it was obvious they were not going to hire him.''

E. W. Mosteller recalled he picketed at different times and dates over the next 2 months (after he applied on September 20, 1989), at one gate (Brown & Root), and, he recounts that he probably did so at the Union's request. He has candidly acknowledged that SAFE was more or less the program set up there for them to try to let the people know about having people there that we felt did not know how to perform the work safely. E. W. Mosteller carried signs having to do with safety on the job; and he had also read the literature on a few of the problems in Texas. He also testified that he had 20 years of qualifications that made him feel better qualified to work around the dangerous stuff you would encounter there, than the people he was told, and that he believed, that they (Brown & Root) were hiring off the Street. E. W. Mosteller acknowledged (on union questioning) that on one occasion he had picked up a mud ball, but testified he did not throw it, because his good common sense stepped in. *G. Mosteller*, with medical conditions elsewhere shown herein, did not testify in this proceeding. Others testifying have recalled his presence on a picket line at the Brown & Root gate, generally (e.g., Hale, Hudson, L. Johnson, D. Mosteller, Pinkerman, and Webb), and the number of occasions range from one time (Hudson) to multiple occasions (D. Mosteller).

All applicants who have testified that they recall seeing any of the Mostellers on the picket line (at least all those who were asked), have testified that they did not see any of them block cars; throw things at cars; and/or shout any obscenities. Although Employer has adressed considerable areas of 8(b)(1)(A) type misconduct, and I have no doubt a good deal of it occurred, the fact that has also repeated in this record to point of ready persuasion is that such activity in the main has not been shown to be conduct in which the named discriminatee-applicants are effectively shown to have been engaged in. The uncorroborated testimony of Bragg on the Mostellers picket line activities as shown above, its vacillation along with Bragg's perceived defensive retorts reach the point that I am reluctant to credit it in any selective particular without some additional corroboration of their individual involvment in 8(b)(1)(A) type misconduct. There appears to be none.

Moreover, there is no visible (documentary) corroboration of the Bragg described incidents. In light of the apparent vacilation of Bragg, in contrast with the substantiation of others who appeared on the picket line with these employees, and who have testified they did not see any of the Mostellers block and/or obstruct (slow-walk) traffic, and in light of Bragg's own consistent acknowledgment that none of them had engaged in any other claimed misconduct, I decline to selectively credit certain of Bragg's above testimony, beyond that which he principally has consistently complained of, namely they had walked in front of his truck and the vehicles of others as they tried to pass in and out.

In regard to *individualized* 8(b)(4)(i) and (ii)(B) conduct on the picket line, Employer *lastly* contends that the record reveals discriminatee-applicants L. Johnson and Lowell Templeton picketed illegally, i.e., they have picketed at Rhone-Poulenc's main gate.

Templeton picketed only twice, and he thought that it was after he applied on September 20, 1989, though from his description of some of his picketing activity even that is questionable. Templeton recalled that he picketed only for a short time and he did not recall carrying a sign. On at least one of the two occasions (I find) probably the first, Templeton recalled he did so at Bush's request. Templeton recalled that he was working elsewhere at the time, and one day he went up early in the morning. He did not think any one was in charge then, though there were some (unidentified) people from the building Trades Council there. Templeton did recall that on his first occasion he was up at the gate near the light (thus at the Rhone-Poulenc main gate). He went on to testify, however, that they then moved (I find) between 8 to 9 a.m., because for whatever reason, you could not do it at one gate (main gate) you were to do it at another gate (Brown & Root's gate). Templeton's testimony more convinces me that he participated on the first day of the picketing on September 18, 1989, when there was the above described corrected movement of pickets.

Be that as it may, contrary to Employer, Templeton's account in any event does not convince me he (or any other named discriminatee-applicant) picketed at Rhone-Poulenc's main gate with secondary objective on that occasion; indeed, if anything, the very movement of the pickets in the early morning persuades of the contrary on his picketing that day.

L. Johnson initially picketed five–seven times at gate C that he has placed generally in the late fall; and, though he acknowledged that he may have been asked to picket there, he (essentially) has also testified that he went there by himself. L. Johnson always carried the same sign on the picket line, i.e., ''*Honk For Your Support.*'' But he saw signs there that said, ''*Unsafe Practices*'' and ''*Give the boot to Brown & Root.*'' L. Johnson believed that Brown & Root was unsafe, because he had heard about the bad welds, and different things; but he testified the majority (sic) of his belief came from the list Bobby Thompson had compiled, and that Thompson had available in a Bearer (Brown & Root) safety record and training presentment made before a group (probably CSA, in December 1989), that they did not seem to want to talk about. There is no evidence that is presented that L. Johnson participated in any 8(b)(1)(A) type misconduct.

L. Johnson has acknowledged, however, as Employer has contended, that he participated in certain (claimed) informational picketing (much later) at the main gate of Rhone-Poulenc. Thus L. Johnson testified that there was one day that an informational picket line was set up at Rhone-Poulenc's main gate, that L. Johnson recalled was *right after*

the MIC leak and radio report of injuries (thus early February 1990). He testified that he went there on that occasion to inform the employees working in/for the plant (thus, the Rhone-Poulenc, and Union Carbide employees) how they (seemingly the picketers) felt about Brown & Root's safety record. There is no evidence L. Johnson said or carried a sign that urged any Rhone-Poulenc/Union Carbide employees to cease working, etc. Nonetheless, Employer contends and I agree that by engaging in picketing at Rhone-Poulenc's main gate while his dispute was with Brown & Root L. Johnson engaged in 8(b)(4)(i) and (ii) type conduct.

L. Johnson also recalled that there were several other boilermakers in the group that was there, whom he knew, but whose names he then asserts he did not recall; nor did he recall whether the sign ''Give the Boot To Brown & Root'' was in use at the main gate that day. While I have some reservations in the latter regards, other than what is presently reported and considered herein, there appears to be no additional evidence presented that any of the boilermaker discriminatee-applicants participated with L. Johnson in described picketing conducted at the Rhone-Poulenc main gate that day. Thus, of all 47 named discriminatee-applicants, only L. Johnson has picketed at the main gate reserved for Rhone-Poulenc and Union Carbide employees, on a late (but not 8(b)(7) period) occasion. As in 8(b)(1)(A) instance shown on Hudson Sr., where his admission on that conduct did not come till hearing; Employer's awareness of L. Johnson's picketing at the Rhone-Poulenc plant came only with his revealment of it at hearing. Employer clearly had not previously relied upon such conduct as its reason for not considering for hire, or refusing to hire L. Johnson for obvious reason the conduct occurred 5 months later.

Finally, before addressment of the central remaining matter of contended discriminatee-applicant general participation in 8(b)(4) (or (7)(C)) picketing, it seems warranted conclusion at this junction that it simply will not do on this record to relegate the above raised safety concerns and demonstrations to a place behind a general cloak of irrelevancy. The fact that Bobby Thompson did not have all the evidence that he eventually collected on Brown & Root's safety and work records when he began his critical campaign against Brown & Root's safety record, and/or that he selected past work records to publicize in an attempt to make a held point that Brown & Root was unsafe, with a perceived history of employment of (at least) some unskilled employees, does not detract from the fact that Bobby Thompson had timely centrally pursued the contention, and continuously accumulated evidence on it for use in Building Trades joint fight back program, albeit he did so in name of SAFE, and along with those who were both members of unions affiliated with Charleston Building Trades Council, and others not.

Employer's claim is the unions affiliated with the Charleston Building Trades Council, including Boilermakers Local 667, made no effort to evaluate safety records in compared size of companies. The argument is then made that the unions, including Boilermakers Local 667, have really made a pretextual use of Brown & Root's safety situation. Howsoever pretext may be made the more difficult of resolution in the above determined safety concern background, it is in the end but another factual issue to be resolved on basis of weight of more credible evidence of record. On this record, the argument that is made on safety pretext is simply not persuasive.

The Employer would rely on the contended the union use of certain secondary signs and leaflets to establish the Union's picketing was with an objective that was secondary, namely, to restrain and coerce Rhone-Poulenc (and other secondary employers) and to induce and encourage employees of Rhone-Poulenc (and employees of other secondary employees), to withhold their services, with an object thereof being to cause Rhone-Poulenc to cease doing business with Brown & Root. First, no sign or leaflet handbilled, had sought to induce or encourage employees to withhold their services from Rhone-Poulenc or any other secondary employer.

As to the question whether so-called secondary signs were effectively attributed to Local 667, its officials, or the boilermaker discriminatees, Employer correctly asserts on the law, that it is irrelevant that some (or most) of the signs during the picketing had contained a safety message, as long as at least one object of picketing is shown by the weght of credible evidence to be unlawful, see, e.g., *Mine Workers District 29 v. NLRB*, 977 F.2d 1470, 1471 (D.C. Cir. 1992) (''one object of the picketing, even if not the sole object, was to induce the [neutral business] to cease doing business with the [primary employer's] employees''); and, *Electrical Workers IBEW Local 6 (Intercontinental Hotels)*, 286 NLRB 680, 685 (1987) (''if one of the objects of the picketing was unlawful, it is immaterial that [the union] had a legitimate interest in protesting'' other matters). But no discriminatee-applicant is shown to have carried signs that referenced variously to ''Give the Boot to Brown & Root,'' except Elliott, and he permissibly at the gate reserved for Brown and Root.

With regard to appearance of urged use of secondary signs of nature that Rudy Shomo lies, or that Rhone-Poulenc is unsafe with Brown & Root, there is no instance shown that a discriminatee-applicant ever carried such a sign at any gate, let alone the main gate. Where there is no direct evidence to link any named discriminatee-applicant to carrying such signs, it is then only the more significant to observe that in material times not only were there some Rhone-Poulenc employees agrieved and actively participating in the picketing at the main gate, but on some six or more occasions removal of Brown & Root messages were written on pigpen (smoking area) walls on the jobsite premises, which Pribyl had to have painted over. It is, if anything, more readily inferable that personages other than the named discriminatee-applicants were associated with such statements off premises (e.g., at the main gate), as well as they were on premises, for clearly no named discriminatee-applicants were ever on premises, while employees of Rhone-Poulenc (represented and not) regularly were, and had access to the smoking areas, while the discriminatee-applicants did not.

The Board has reaffirmed the principle that, where a union makes no effort to limit its appeal to a primary employer after separate gates are established, the inference is justifiable that the union's purpose is to cause pressure upon the primary by the neutral employers. 262 NLRB at 1218. And see, *NLRB v. Roofers Local 30*, enf. mem. 975 F.2d 1551 (3d Cir. 1992) (full text of decision reprinted only at 141 LRRM 2459; opinion is cited as mem. only at 975 F.2d 1551), affirming that when a *Moore Dry Dock* reserved gate system is established and the union pickets a neutral gate, the object

of the picketing is presumptively to encourage neutrals to cease doing business with the primary employer. But that addresses conduct by a union, which does not necessarily involve an employee picketing at a primary location.

Employer contends that in this case, the Charleston (and West Virginia) Building Trades Council(s), and affiliate member Boilermakers Local 667 engaged in conduct of a nature that violated the third (as to the main gate) *Moore Dry Dock* element above. But even assuming without deciding that Boilermakers Local 667, did so, in some measure with the above Trades Councils, the fact is that 6 of the 47 discriminatee-applicants did not picket at all; and 40 of the 41 remaining discriminatee-applicants who picketed, did so only at Brown & Root's gate; and all discriminatee-applicants that picketed and carried signs at the Brown & Root gate, carried safety signs, except Elliott who carried a sign that said, ''Give The Boot To Brown & Root,'' permissible at Brown & Root's gate.

Similarly there is no ready connection made between the discriminatee-applicants (or Local 667's officials) and the signs referencing Rudy Shomo lies or Rhone-Poulenc, assuming without so deciding, the signs with statement(s) (essentially) Rudy Shomo lies, were secondary when used at either main gate, or Brown & Root's gate. It would seem, however, since there was a labor dispute, signs of order calling variously for a ''Boot'' (boycott) of Brown & Root with whom there existed a a primary labor dispute, as shown in use at Brown & Root's reserved gate, would not produce an illegal picketing effect, i.e., reflect an illegal secondary objective (and thus not do so when carried by Elliott). Under the circumstances present here, where most of the signs were safety signs, where almost all, if not all discriminatee-picketers have picketed carrying safety signs, or while others displayed safety signs, it seems to me some more direct evidence of a discriminatee-applicants' involvement in claimed secondary picketing activity at a primary gate is required, but is here fatally missing. The Union urges the Board should apply the same rule in 8(b)(4) cases as it does in Section 8(b)(1)(A). The Board has recently held, where there is no evidence that a discriminatee has participated in the secondary picketing of his union, a contention the discriminatee has engaged in unprotected activity in refusing to enter the jobsite at the primary gate assigned to him, is without merit, *Martel Costruction*, 311 NLRB 921 (1993).

Final issues, arguments, and analysis

The defense in final analysis rests on Employer's contention that other evidence establishes that the discriminatee-applicants have engaged in illegal picketing. Employer observes that it is well established Board law that strikers and pickets who have engaged in unlawful picketing, or other strike or picket line misconduct, forfeit their rights under the Act. Under these circumstances, an employer will not be found to have violated Section 8(a)(3) and (1) of the Act by discharging, refusing to reinstate or refusing to hire those who engaged in the unlawful picketing or misconduct. In support of contention that all the discriminatee-applicants who picketed have forfeited any employment right they might otherwise have enjoyed, Employer relies on *Rapid Armored Truck Corp*., 281 NLRB 371 (1986); *Teamsters Local 707 (Claremont Polychemical Corp.)*, 196 NLRB 613 (1972); and, *Mackay Radio & Telegraph Co*., 96 NLRB 740 (1951).

Employer argues since as far back as *Mackay Radio*, supra, the Board held strikers who engage in unlawful conduct forfeit their rights to protection of the Act and it would not effectuate the policies of the Act to allow them reinstatement and backpay. *Mackay Radio*, supra, also held it was not necessary for an employer to have relied on that misconduct at the time that it made its discharge decision. Rather the strikers' illegal conduct peremptorily deprived them of the Act's protection, 96 NLRB at 743. Employer argues the alleged discriminatees in the instant case who are shown to have participated in the illegal picketing at the Rhone-Poulenc plant are not entitled to assert their claims under Section 8(a)(3) and (1) of the Act, and complaint should be dismissed as to them.

In *Mackay Radio*, supra, the circumstances were that the union had called a strike to compel the employer to accept certain unlawful contract provisions (i.e., unlawful union-security proposals), and which was determined as one of the ''principal objectives of its striking.'' 96 NLRB at 741. The strike was ruled illegal from its inception, and the Board held that employees who participated in it ''forfeited their rights to the protection of the Act.'' 96 NLRB at 740. In *McKay Radio*, supra, 96 NLRB at 742, the Board relied on *American News Co*., 55 NLRB 1302 (1944), and ruled certain other cases considered therein, those in which the Board had limited the holding of *American News*, supra, were inapplicable to a case such as *McKay Radio*, supra, ''in which the record clearly demonstrates the strikers determination to compel the Respondent to violate the Act.''

Upon first making the point that the strike was not preceded by employer unfair labor practices, the Board held *American News*, supra, involved a strike called to compel the employer to grant certain wage increases prior to a required approval of the National War Labor Board, which, if the employer had complied would have carried criminal penalties for it. The strike knowingly prosecuted to compel an acknowledged violation of an act of Congress itself, was concluded as not protected under the Act. 55 NLRB at 1307.

Further, the Board expressly held in *McKay Radio* that:

> [T]he employees who participated in the ***unlawful* strike . . . may not invoke the protection of the Act because they were denied permanent reinstatement at the end of the strike, *even though the [employer] may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers.***

96 NLRB at 743 (first emphasis in original, second emphasis added). The Employer would see also *NLRB v. Fansteel Metallurgical Corp*., 306 U.S. 240 (1939), in which the Supreme Court held an employer ''stood absolved'' of any duty to reinstate its employees who had engaged in an illegal sit-down strike. 306 U.S. at 259. Moreover, Employer noted, the employer there stood equally absolved of any duty to reinstate those who did not participate in the strike, but who had aided and abetted it by obtaining and delivering food, supplies, or had assisted the illegal strike in some other manner. 306 U.S. at 261.

The cases distinguished involved either *violence, or other similar conduct* during the course of otherwise *unlawful*, albeit not always protected concerted activity (e.g., *Hoover Co*., 90 NLRB 1614, 1622 (1950) (*mass picketing*), set aside

on other grounds 191 F.2d 380 (6th Cir. 195); *Acme-Evans Co*., 24 NLRB 71, 100 (1940) (*violence*), enf. 130 F.2d 477 (7th Cir. 1942), cert. denied 318 U.S. 732 (1942); or, participation in *concerted activity* (i.e., strikes in breach of contract) that the Board, for policy reasons, had held to be *unprotected*. (Other cases cited, e.g., on illegal sit down, omitted. (In *Hoover*, supra, the company discharged a number of members of the union's executive board because of the union's refusal to call off a (lawful) consumer boycott of the company's products. 96 NLRB at 747 fn 24.)

The Board in *McKay Radio* said, id. at 743:

> We do not here hold, as our dissenting colleague suggests, that participation in an unlawful strike automatically terminates the strikers employment relationship. We decide no more than is required by the facts of this case: namely, that the employees who participated in the unlawful strike of the kind herein found may not invoke the protection of the Act because they were denied permanent reinstatement at the end of that strike, even though the Respondents may have failed to assert the illegality of the strike as the basis for denying reinstatement to such strikers.

It is then Employer's central contention here that most recently, in *Rapid Armored*, supra, the Board affirmed an administrative law judge's holding that employees who picketed to achieve an unlawful objective in violation of Section 8(b)(7)(C) of the Act ''forfeited their right to invoke other provisions of the Act.'' 281 NLRB at 371 fn. 1, 382. Employer observes, the judge's decision reveals the employer there did not know that some of the alleged discriminatees had picketed at the time the employer refused to reinstate them. 281 NLRB at 382. Nevertheless, the judge held, with Board approval, those picketers could not invoke the protection of the Act, even though the employer did not rely at the time on the illegality of their conduct as basis for denying them reinstatement. 281 NLRB at 371 fn. 1, 382.

With stated reliance on *Wells Fargo Corp*., 270 NLRB 787 (1984), affd. 755 F.2d 5 (2d Cir. 1985), cert. denied 118 S.Ct. 2613 (1985), the Board held in *Rapid Armored*, supra, on expiration of the contract there, there was no obligation on an employer to continue to recognize or bargain with a union that is ineligible for certification under Section 9(b)(3) of the Act because of their policy of admitting both guard and nonguard employees to membership. The Board held in *Rapid Armored*, supra, 281 NLRB at 371 fn. 1:

> Thus, by engaging in a strike to compel the Respondent to recognize and bargain with Teamsters Local 807, which under *Wells Fargo* the Respondent could lawfully refrain from doing, the employees of the Respondent engaged in unprotected conduct. Further, as found by the judge, the employees engaged in conduct prohibited by Sec. 8(b)(7)(C) when they picketed to achieve that objective. For these reasons, we find that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by refusing to reinstate or by discharging its striking employees who engaged in the unlawful picketing, and further find, in agreement with the judge, that the Respondent did not, in any other respect, violate the Act.

In finding that illegal picketing in violation of Section 8(b)(7)(C) of the Act, was an activity which seriously contravened the policies of the Act, and that employees who participated in such picketing forfeited their right to invoke other provisions of the Act, the judge in *Rapid Armored*, supra, 281 NLRB at 381 relied on *Teamsters Local 707 (Claremont Polychemical)*, 196 NLRB 613, 627–629 (1972).

In *Local 707*, the Board, in approving the trial examiner's decision, upheld protected conduct in engagement in a lawful strike (after an organization and demand for bargaining), but then held employees who resorted to picketing for recognition within 1 year of the holding of a valid election, was an activity that was specifically interdicted by Section 8(b)(7)(B) of the Statute; and the Board held, where the activity engaged in by the employee is participation in an activity which contravenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with backpay, *Local 707*, supra, 196 NLRB at 614. Observing the Supreme Court's admonishment there that ''[T]he Board should deny reinstatement to strikers who engage in strikes which were conducted in an unlawful manner, or for an unlawful objective'' in *Local 707*, the Board then exercised that authority, ''to deny a remedy to those employees who engage in picketing contrary to the provisions of Section 8(b)(7)(B) of the Act.''

Employer here further argues that similarly, in *Local 707*, supra, the Board expressly approved an employer's failure to reinstate employees who had picketed in violation of Section 8(b)(7)(B), saying, ''[W]here the activity engaged in by the employee is . . . an activity which contravenes the policies of the Act the employee has forfeited his right to invoke other provisions of the same statute to restore him to his job with backpay.'' 196 NLRB at 614.

There the trial examiner (TX) also had found the company had made no effort to determine which employees participated in picketing, but rather had discharged the alleged discriminatees because of their participation in a lawful strike. 196 NLRB at 629. Nevertheless, the TX found that to the extent the discharged employees in fact had picketed in contravention of the policies of the Act, their misconduct justified the employer's refusal to reinstate them, regardless of employer's lack of reliance on that misconduct at time of its decision. 196 NLRB at 629.

Employer's basic argument from the above is that as in the cases discussed above, evidence in the case at hand has established, with but few exceptions, that all alleged discriminatees participated in illegal 8(b)(4)(i) and (ii)(B) and (7)(C) picketing. Hence, pursuant to *Rapid Armored Transport Local 707*, supra, and *Mackay Radio*, supra, the applicants may not use the Act either as shield or sword, and complaint as to them should be dismissed. Employer centrally contends frequent presence of the officials of Boilermakers Local 667, the Charleston Building Trades, and the WVa Building Trades during the picketing has the effect of making it plain that all those unions bear a mutual responsibility for any improper and illegal picketing that is shown to have occured there.

But the instant case does not involve a strike to compel the Employer to accept illegal contract provisions, or to violate another act of Congress. Neither does it involve an unlawful plant seizure and/or sit down strike that was illegal in its inception and prosecution, and was aided and abetted by

other employees, *NLRB v. Fansteel Corp*., 306 U.S. 240, 256 (1939); nor to compel an employer's acceptance of a statutorily proscribed guard-nonguard unit, *Rapid Armored*, supra. The case doesn't involve a strike at all. Moreover, it is clear Employer didn't rely on the picketing in its evaluation of its applicants for hire.

While I have had reservations in placing any reliance on the General Counsel's and Charging Party Union's argument resting on the circumstance that Johnson had not asked applicants if they had picketed, I have no reservation in concluding Respondent Employer in fact did not evaluate applicants for hire on the basis of individual misconduct, in that Respondent had not as of then reviewed the videotapes and films it had in its possession to determine if any individual applicant could be identified as having engaging in any specific picket line misconduct. It did not need to because Pribyl had made a connection between the picketing and the Boilermakers and he had decided that it was those who made the statement that they were Boilermakers Local 667 Volunteer Union Organizer on their application who would not be hired.

It is also significant that Kilburn's substantial efforts at identifying principal actors on the picket lines has not led to identification of any of the discriminatee-applicants as engaged in any picket line misconduct. The efforts he made did not, because the discriminatee applicants by and large had not engaged in picket line misconduct. The General Counsel rightly observes that the testimony of Employer's safety supervisor, Thorn, as to his observance (on Brown & Root's gate) is instructive. Thorn, in his role as safety officer spent a lot of time observing the pickets, engaging in surveillance of them, watching them through video cameras, etc. Thorn has then only the more persuasively testified that he never saw McCormick (or Thomas) engage in any violent act on the picket line (Tr. 4762–4763). Thorn never saw any pickets that wore Boilermaker jackets or other insignia, let alone the named Boilermaker discriminatee-applicants herein, engage in any violent acts (Tr. 4764). The same then is but further powerfully confirmed by comparative dearth of direct, credible evidence of any 8(b)(1)(A) type conduct connected here to discriminatee-applicants, as opposed to the weight of evidentiary accounts of such events that occurred but that are left unattributable to them.

Absent culpable 8(b)(4)(i) and (ii) misconduct, involvement of discriminatee-applicants in 8(b)(7)(C) picketing is much ameliorated as the period of contended violation does not begin until 5–6 months after Employer's unlawful refusal to consider them for hire, or to hire them. In the interim they had engaged in primary picketing, i.e., picketing with lawful purpose, and means. Contrary to Employer, in my view, this is simply not a case for an extension of the *Rapid Armored* principle. Two of its elements are missing, Employer did not rely on recognitional picketing; and, picketing was not solely recognitional. The case is more likened to *Colonial Haven Nursing Home*, 218 NLRB 1007 (1975), in that regard, even though not involving an unfair labor practice strike.

Respondent has failed to sustain its burden that it in good faith failed to consider for hire, or hire the above 47 named discriminatees because of their suspected picket line misconduct. Rather it did so because they had declared on their application that they were Boilermaker Local 667 Volunteer organizers, or words to that effect. Accordingly, I conclude and find that Respondent has discriminatorily refuse to consider for hire, or to hire the 47 named Boilermaker discriminatee-applicants, in violation of Section 8(a)(3) and (1) of the Act.

Part II. The Union's Formal Organization Campaign and Related Events of Tom Lucas

In general, Employer contends Tom Lucas was a plant, and a union agent, provocateur. The General Counsel and the Union (essentially) contend it is inherently plausible that when openly declared union organizing adherents are not hired, that others will not openly declare such to be succcessful in being hired; and that Employer's summary of Lucas's union activity but reflects its antiunion views. Employer contra-asserts virtually all of the (independent) 8(a)(1) and (3) allegations of the complaint emanate from Lucas source. Employer urges that to properly evaluate the evidence, it is essential to understand both the role that Lucas played for Boilermakers Local 667—that of an ''agent provocateur''—and his understandable frustration at his virtual total lack of success as a union organizer, undercover or overt. The Employer, in any event (essentially) contended it is discernible there is a series of uncorroborated, untimely, often inherently implausible charges that are fabrications of the Union's plant, and deserving of no credibility.

In light of earlier findings that Respondent has discriminatorily refuse to consider for hire, or to hire the 47 named discriminatee-applicants, who had put on their applications that they were Boilermaker Local 667 Volunteer Union Organizers (or words to that effect) in violation of Section 8(a)(3) and (1) of the Act, it then follows as somewhat disengenuous for the Employer to fault a Boilermaker applicant's concealment of his organizational intent, until after hired. Nonetheless, Lucas was new to organizational effort, had (at best) late modest success in organizing, certainly not reaching anything like obtaining a majority designation. In general overview, as will be seen below on a number of occasions, in my view, Lucas has revealed he was oversensitive to management operational directions, but not always.

1. Lucas' hire compared

Lucas was first hired by Brown & Root on January 25, 1990, though Lucas' application is dated and signed on January 8, 1990, he had apparently initially interviewed with Johnson for a job on January 18 (Tr. 487). He participated in the Building Trades picket line outside of Brown & Root's location at Rhone-Poulenc (Tr. 449). Lucas had first began participating in the picket line prior to the time that he had submitted an application at Brown & Root. It is not contended that he engaged in any violence, when on the picket line.

When Lucas was later interviewed by Johnson as he submitted application, Johnson did not ask Lucas if he had been on the picket line (Tr. 450). As to why he had engaged in the picketing, Lucas said it was because he felt there was a contractor there doing unsafe work. Nonetheless, Lucas, like others affirmed he still wanted to work for Brown & Root because he was unemployed and because he had to feed his family (Tr. 450). (The same week Lucas was hired at Brown & Root, Lucas ran out of unemployment benefits.) At no time did any representative of Employer tell Lucas, or any

other employee in his presence, that being on the picket line would somehow disqualify him from employment with Brown & Root. Indeed, Lucas was also on the picket line during the time he was employed at Brown & Root, stopping off a couple of evenings, without employer incident (Tr. 463).

Although Lucas was (previously) aware certain Boilermakers were placing on their applications that they were ''voluntary union organizers'' (and according to Employer, knew that Boilermakers Local 667 had directed it), Lucas did not placed that on his application. Lucas testified he did not place that on his application because he felt (in light of my findings, rightly) that that would hinder his chances for a job (Tr. 394–395).

Employer asserts that in truth, the reason was, as Local 667's business manager, James McCormick, acknowledged, that Lucas was a ''plant'' (Tr. 2141). In fact, McCormick advised the membership that they should conceal the fact that Lucas was on Brown & Root's payroll so that Lucas could continue to function covertly (as Employer views it) as part of the Union's attack on Brown & Root. Employer argues (unpersuasively) the fact that the Union's ''plant'' did not identify himself as a voluntary union organizer in the application process and that Lucas' infiltration into Brown and Root's workforce was deliberately concealed, directly contradicts testimony by McCormick and Thomas that union members were told to write ''voluntary union organizer'' on their applications in order to be truthful and forthright (Tr. 1117, 1118, R. Exh. 73 at 4; Tr. 2143, R. Exh. 76 at 8, par. 2). But contrary to such Employer urgings, I find that described is the fact that Lucas was a union adherent, a member, who concealed his union activist status on reasonable cause, and eventually openly acted as a Boilermakers Union organizational activist. All of this is but summary of an employee's protected prounion choice; and, Employer's related arguments that the Union controlled Lucas' employment at Brown & Root, it seems to me, fall legally to protections of his opting for other choice, e.g., see *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

Employer contends that in reality, Brown & Root treated Lucas the same as anyone else—whether union or nonunion—even during his ''covert'' stage. Brown & Root hired Lucas as a pipewelder in late January 1990, even though his application clearly showed his union background (G.C. Exh. 11). All four of the previous employers that he listed on his application were union contractors. I have earlier found that Johnson acceded prior union employment often was shown by the wage rates paid (Tr. 4978). Lucas' application showed wage rates from $15 to $19 per hour, indicating to him union status.

Lucas recalled relatedly that when he went in to speak to Johnson about the application he had earlier turned in, that Johnson initially was unable to find Lucas' application. Lucas then saw Johnson pull his application from a file that was segregated from the others. I credit Johnson's explanation that was so because of the nondiscriminatory method he utilized of categorizing employment applications into separate craft files (Tr. 4968), as earlier found. When Johnson interviewed Lucas, Lucas stated he was a pipe welder; and, Johnson (plausibly) checked the welder craft file first (Tr. 5035). I am convinced that the location of Lucas' employment application involved no more than that.

Lucas related, during his interview with Johnson, Johnson asked Lucas if he had worked for any other employers and Lucas answered Putnam Fabricating. When Johnson asked why he had left Putnam, Lucas told Johnson that it was a union shop, and they (meaning the union) had shut it down, and he had to leave. According to Lucas assertion Johnson seemed to become more interested in Lucas' application when he made this remark about the Union causing Putnam to shut down (Tr. 397–398). Lucas told Johnson of certain other contractors he worked for, all of whom were nonunion and Johnson then turned around and looked Lucas pretty well square in the eye and said, ''You're just the type of man we are looking for'' (Tr. 399). Johnson told Lucas that his full beard would have to go, but he could keep the mustache. After that, Johnson made arrangements for Lucas to take a physical and to begin the hiring process (Tr. 399–400). Lucas had *15 years experience*; and, the parties have stipulated Brown & Root hired Lucas as a welder; and, that his application indicated that he was qualified to perform the work he was hired to do (Tr. 589).

Johnson testified he did not recall discussing Putnam Fabricating with Lucas, and he did not know what Putnam Fabricating was. (Though Lucas had mentioned the Putnam closure also to Foreman Cole in early February (below), Lucas had also reiterated firmly the statements that Johnson made to him at the time he was interviewed and hired.) Thus, Johnson stated all the various other qualifications that Lucas would have to meet in order to be hired. Johnson told Lucas he would have to pass a physical, a drug test, a welding test, and shave his beard. (Lucas denied Johnson had said anything about there being a qualification for the job that he could not have been on the picket line engaged in illegal picketing.) The only thing Johnson had said about a picket line was there was a picket line, and Lucas would have to cross it (Tr. 591).

Johnson has denied making any such statement (''You're just the type of man we are looking for''). He testified he would never say this to an applicant, i.e., infer to the applicant that he would be guaranteed employment, because it would be misleading (Tr. 5035). But here, in the same interview, Johnson began the hire process, with statement of other qualifications. In this matter, I credit Lucas' account. Lucas continued in employment until November 1990, when he was laid off (Tr. 392, 616).

The union internal authorization of Lucas' employment acceptance

McCormick (and Bush) signed a letter (C.P. Exh. 1) dated January 24, 1990, which McCormick gave to Tom Lucas. This letter gave Lucas permission to work for the nonunion contractor, Brown & Root. It said, ''This approval is being granted with the hope and expectation of furthering the advancement of Union Labor throughout West Virginia and the United States.'' McCormick acknowledged he had not given written permission to any of the other applicants who had earlier applied at Brown & Root; but, he testified (credibly) that if they would have gained employment at Brown & Root, he would have also given them written permission to work there (Tr. 1120).

2. The hire of Vesper Lewis

The General Counsel's witness Vesper Lewis testified that he worked for Brown & Root at the Rhone-Poulenc jobsite from approximately January 19 to April 15, 1990. Lewis described his hiring process. When Lewis heard they were hiring, he called the employment office, contacting Johnson there. Lewis told Johnson he was interested in pipefitting work. Lewis recalled he heard back from Brown & Root's pipe superintendent Jesse _____ (probably, and I find, Brown & Root's project manager, Jesse Cowart) in 10–15 minutes (Tr. 794–796). Lewis recalled Cowart at the end of the conversation, said there was a little union problem, but did not go into detail. But Lewis affirmed that Cowart did not ask Lewis whether he had engaged in picketing at Brown & Root (Tr. 796).

Lewis testified that in another 15 minutes, Johnson called Lewis back and told him the conversation with Cowart went well, and he was hired. Lewis was hired as a pipefitter, and he did no welding or pipe welding on the job (Tr. 810). After they worked out notice to another employer, Johnson asked if Lewis had any problem crossing the picket line, and Lewis told Johnson that Lewis did not want to cross the picket line if he was taking a job away from a union worker. Lewis testified that he was not, and had never (previously) been a union man, but when applying for work and is told there is a picket line, he assumed, as in a contract dispute, they were taking work away from people who lived locally and giving it to out-of-town people. (Lewis signed a union card for Lucas and Thomas at a local restaurant on March 5, 1990, after Boilermakers Union began its formal organization campaign on February 26, 1990, but before Lucas began openly organizing on premises on March 7, 1990.) In hire interview Johnson told Lewis he was not taking a job away from a union worker, and, there was work there for everybody.

According to Lewis, but on a leading question, Johnson then asked Lewis if he was a member of the Union and if he had a union card. Lewis explained (sic) he was not a member of the Union and had no card. Johnson told Lewis to show up for work on January 19, 1990 (Tr. 797–798). (With physical, etc., requirements, Lewis actually began work for Brown & Root some time after January 19, 1990.)

The complaint does not allege, and the General Counsel did not seek to amend the complaint to allege Lewis version of a Johnson-Lewis January interrogation of whether Lewis was a member of the Union, or had a union card, as an unlawful interrogation in violation of Section 8(a)(1) of the Act. (The complaint alleges only that Johnson coercive interrogation of an employee about union membership had occurred in or about April 1990.)

Lewis on further questioning reiterated the statements that Johnson had made during the phone conversation when Johnson hired him, and confirmed that he asked questions about crossing the picket line. On one occasion he affirmed Johnson made a statement they did not want union workers on this particular job to organize the job and make it a union job (Tr. 813). Lewis on other occasion (I find) unsurely, and unconvincingly recalled Johnson saying, ''There are jobs for everyone and we don't want those people out here. There was work for both people and we don't want—you know—we don't need and we don't want union people out here on the job'' (Tr. 885). Lewis later affirmed Johnson made the statement Brown & Root was an open job and they did not want to see the Union come in and to organize this particular job in the context of the picketing going on (Tr. 886–887).

Johnson testified firmly that he never asked Lewis if he was a member of a union, or if he had a union card, because that is a question he never asks any body. Johnson related, as an experienced personnel manager in the construction industry, he never questions any applicant on union affiliation. In this regard, I credit Johnson, and I find that he did not ask Lewis if he was a member of a union, or had a union card. Johnson also credibly denied he said on that occasion ''[w]e don't want that type of people out here on the job,'' or, on other occasion, the Company didn't want unions out there (Tr. 5029–5030).

In agreement with Employer, I conclude and find that when Lewis stated that he did not wish to take a job away from a union member, Johnson then more likely responded he was not, and that there was enough work for everyone, union and nonunion alike, a statement that is neither illegal nor evidence of antiunion motivation (Tr. 826, 864), even if he had additionally expressed his viewpoint he did not want to see the job organized by those on the picketline.

In general overview Respondent's own supervisors testified that Lucas and (and Coon, when a union supporter) were good workers, productive, and engaged in no acts of sabotage (though in Foreman Berry's view, Lucas had a below standard attendance record). Lucas (and other union supporters) did not allow his (their) union activities to interfere with job productivity (Foremen Fitzgerald, Tr. 2777; and Berry, Tr. 2849–2851). Respondent's employees have also affirmed Lucas' attempts to organize them were always conducted in a friendly fashion (company witness employee Sanson, Tr. 3287; and Bragg, Tr. 3418). Indeed, Respondent's witness (S. Johnson) has testified Lucas had told him when he attended a union meeting, that the object of the Boilermakers' campaign was an NLRB sponsored election (Tr. 3114). (S. Johnson placed this union meeting in September, though he had initially received union literature from the Charleston Building Trades in (late) February. At that time S. Johnson had turned the union literature in to the electrical superintendent.) There is, however, no evidence that S. Johnson went to a union meeting until September, and after he talked to Lucas.

3. Supervisor Thorn's (Lucas) safety orientation meeting

The General Counsel contends animus is also clearly indicated in the comments attributed to Respondent's safety supervisor Thorn at a safety meeting around February 1, 1990. Lucas testified he attended a safety orientation meeting shortly after he was hired. In response to a question from an employee ''what do we do if there are pickets out there and we can't get in?'' Thorn said that they had an alternative plan if they could not get in and he was not going to go into it right then and that they need not worry about that because they (Employer) had ex-CIA and secret service people watching those ''union idiots.'' Lucas said Thorn's statement shocked him (Tr. 496).

Thorn categorically denied ever making these statements. He did not refer to ex-CIA personnel or call the picketers ''union idiots'' (Tr. 4713). Thorn did testify that during the picketing activity, new employees often raised concerns

about the pickets at safety orientations and asked what steps the Company was taking to ensure their safety (Tr. 4713–4714). Thorn told them Brown & Root's corporate security department from the main office, which included retired Federal, Secret Service, and Coast Guard intelligence agents, was handling all security matters (Tr. 4713–4714).

Unlike the instance of Coon's credited account of Thorn saying that Brown & Root was not a union company and anyone trying to make it a union company could leave in a much earlier orientation meeting with Thorn in early October 1989, above, I credit and find Thorn's account as the more likely in February 1990. But even were it otherwise, Employer rightly asserts Thorn's statement was not unlawful, *American Commercial Lines*, 291 NLRB 1066, 1068 (1988) (advice involving union matters given in response to employees' questions regarding safety held noncoercive and not violative of the Act).

4. Fitzgerald's threat to lucas that he ''knew how to get rid of shit''; and, the urged support in (unalleged) interrogation and threat to *Lewis*

Complaint paragraph 5(b)(i) alleges Respondent acting through Foreman Tommie Fitzgerald, on or about a date uncertain in February 1990 at a jobsite in Institute, West Virginia, threatened that employees would be discharged if they selected the Boilermakers Union as their collective-bargaining representative.

Lucas recalled an incident with his Foreman Fitzgerald that Lucas placed around February 19, 1990. Lucas (at least at one point) related that he was walking back from a smoke break at a smoke area with another employee, Tom Bostick, and Foreman Fitzgerald. Bostick had then mentioned something about Fitzgerald's job and said, ''Nah, I don't want your job,'' or ''No, I'm not trying to get your job,'' or something along those lines (the latter would indicate prior tension between Fitzgerald and Bostick). Lucas then said, ''Well, I wouldn't have [or want] your job because you've got to take shit from both the men and the Company.'' Fitzgerald then looked over at him directly and said, ''Look, I know how to get—I know how to get rid of shit, Lucas.'' Lucas relates he viewed the remark as threatening, but nothing was said about the Union in the conversation, he did not know if it had anything to do with the Union, and he did not ask what Fitzgerald meant, he just kept walkin off (compare: Tr. 406–407 and 500–502).

The General Counsel argues that another incident described by *Lewis* in his testimony shows strong antiunion animus of Respondent Supervisor Fitzgerald. Lewis recalled a morning around the period February 19 to 26, 1990, when Foreman Tommy Fitzgerald showed him where damage had been done to various things. As Lewis recalled a steel table had been knocked over, plastic cut, plywood pushed down, and barricades knocked down (Tr. 798–799). He recalls Fitzgerald saying on that occasion that ''[t]he Union had probably done this damage'' Lewis, who took the union reference being made to union construction workers, asked Fitzgerald, ''How do you know the Union had done the damage?'' In arguing the matter, and (following considerable confusion and disjointedness), eventually, Lewis (at best) related he asked, if it was the millworkers who had done the damage. (Lewis selected the millworkers because they had access to Brown & Root's work area.) Lewis said Fitzgerald responded, ''The millworkers had no reason to do this damage'' (Tr. 799–800). According to Lewis, Lewis then asked, ''How would you feel if you was in the Union and accused of doing this damage?'' According to Lewis, it was at this point that Fitzgerald said, ''*If you was in the Union, we would probably fire you and replace you with somebody else*.'' (Tr. 800.)

Employer answers that ''Fitzgerald Did Not Threaten to Discharge Union Members.'' Fitzgerald specifically denied telling Lewis or any other Brown & Root employee that if he was in the Union, the Company would fire him and hire someone else (Tr. 2761). Furthermore, Fitzgerald explained that he did not say that the Union probably vandalized the Company's equipment, rather, that he believed that Rhone-Poulenc employees were vandalizing the Company's property. He thought this both because it was a frequent occurrence and because Rhone-Poulenc employees gave Brown & Root employees a hard time about permits and other things (Tr. 2774).

Fitzgerald testified credibly he had assumed Rhone-Poulenc employees may have vandalized their work area, which belief was shared by John Penrod, Brown & Root's mechanical superintendent. Penrod confirmed they had experienced problems with Rhone-Poulenc employees, who called Brown & Root employees scabs and rats, and used a lot of four letter words (Tr. 2801–2803). They threw Brown & Root's work permits in the trash and had ordered Brown & Root crews to stop working so that Brown & Root would get behind schedule (Tr. 2804). As another example of their harassing tactics, Rhone-Poulenc employees had poured water on Brown & Root employees at least three times from above—this was frightening because the plant is full of dangerous chemicals and the Brown & Root employees did not know initially what the liquid was (Tr. 871, 2808).

Employer would have it observed as significant that the General Counsel has produced no witnesses to support Lewis' testimony, though Lewis testified that Fitzgerald's work crew, comprised of 10 to 12 people, was present when Fitzgerald allegedly made this threat (Tr. 836–837). Employer has essentially urged, that in resolving credibility in this matter, that I take into account lack of corroboration of the General Counsel's witnesses amongst other factors. See *Jackel Motors*, 288 NLRB 730, 731 fn.3, 732 (1988), enfd. 875 F.2d 644 (7th Cir. 1989).

On redirect examination, on lead, Lewis testified the Machinists Union had an organizing campaign going on concerning Rhone-Poulenc employees at the same time picketing was going on (Tr. 870); and this was during the same period of time as damage occurred inside the facility (Tr. 871). Grounds for Lewis' erroneous recount of Millworkers, for Machinists, if intended, is not made.

Indeed, much of Lewis relation about Fitzgerald remarks about unions doing damage on the job, is confused, and the culmination in Lewis' purported inquiry of how Fitzgerald would feel if he were a member of the union charged, though compatible with asserted Fitzgerald response, came to me in manner (initially) disjointed, that is not later cured. In any event, with a discredit of Lewis assertion of Johnson's interrogation in Lewis' hire interview, such renders his recollection in this matter (and other matters), the more suspect, and without stronger support of record shown, I do not credit his account of threatening discourse between Fitzgerald and

him, in face of, in this matter, Fitzgerald's more firm and credible denial. I shall not rely on this incident.

Charging Party had asserted Fitzgerald statement to Lucas (seemingly about ''knowing how to get rid of shit, Lucas'') occured during the same period of time that Fitzgerald is telling Coon (sic, Lewis): ''If you was in the union, we would probably fire you and replace you with somebody else'' (with urged reliance on Tr. 799–800 and 842–843); and that, in a similar case, the Board has confirmed that an employer violated the Act when it told employees who supported the Union they would be on the firing list if the Union won the election. *Venus Pen & Pencil Corp*., 144 NLRB 115 (1963). Although I have no quarrel with the authority cited, in light of the findings above made on Lewis' related account, I reject the urged factual connection. The 8(a)(1) allegations regarding Coon (as an employee), are considered below.

As to the base complaint allegation, at the time that Fitzgerald made the statement to Lucas, Lucas was not wearing a union button. Indeed, though as he recalled, he had spoken to some people to find out sentiment, he had not as yet attempted to organize, certainly not then openly commenced his union activity. (Lewis card signing for Thomas-Lucas, had not as yet occured. The Union was not shown directly mentioned in Bostic-Fitzgerald conversation; and, Lucas has admitted that nothing was said about union during the conversation (Tr. 503). Fitzgerald denied making this statement (Tr. 2759). Apart from his denial, even apart from additional arguments that Lucas' accounts are contradictory (apparently on whether they were going to or from the smoke shack, and on who started the conversation), given the circumstances of Lucas' accounts described above, even if I were to credit his account of the generation of the remark most favorable to Lucas, the meaning of the remark remains too undefined and/or ambiguous. I resultingly find no violation here.

5. Pipe and welding general foreman cole's statements; and alleged threat on or about February 16, 1990

Lucas has testified that prior to any (open) involvement of Lucas in the Union, Pipe Foreman Cole had told Lucas he was doing a really good job; and Cole lead Lucas to believe that Lucas was being considered for a foreman's position. The General Counsel's witness Lewis, who had first reported for work on (or shortly after) January 19, 1990, testified that on one of his first days at work, he attended a safety orientation with Supervisor Oscar Cole. Cole stated at that meeting that Cole had worked for Brown & Root for 18 or 19 years and had never been a member of a union, and that Cole did not want to see this job particularly go union (Tr. 798). There is no violation of the Act here.

Paragraph 5(a) of the complaint, however, alleges that on or about February 16, 1990, Oscar Cole threatened employees with discharge should they select the Union as their collective-bargaining representative.

The General Counsel's witness Lucas testified Pipe Foreman Cole made a remark about where he worked and told Lucas around February 19, 1990, that if the Union got in, they would all be without a job (Tr. 407). (Lucas estimating that the date of this Cole incident was within 2 or 3 days of February 19, 1990, although Lucas was not sure of the exact date (Tr. 408).) On cross-examination, Lucas clarified the conversation with Cole occurred after he had brassed out, and in the employee parking lot (Tr. 481). Lucas first amplified, Cole had asked him where he had worked before and Lucas told him the same thing he had told Johnson at his employment interview, that he had worked for Putnam Fabricating, that it was a union shop, and that it was shut down. (Lucas has testified that he told Cole about Putnam because Cole asked where he had worked before; and he had named Putnam, because that is where he had worked most, locally, though not most recently.) It is at this point that Lucas remembered Cole saying, ''Well, I guess you know that if the Union gets in here, that none of us will have a job—or we'll all be out a job'' (Tr. 482).

Lucas confirmed there were pickets outside the gate who were in view to both him and Cole, but Lucas denied presence of the pickets is what prompted the conversation (Tr. 483). The Union's leading examination added (Tr. 585–586) that during that conversation Cole told Lucas the Company would not put up with the Union (Tr. 407). Employer examination added that after Lucas had clocked out early, Cole drove him to the parking lot. While they were in Cole's truck, Cole had asked him where he had worked previously (Tr. 407, 481–482).

Lucas' above account is consistent with Lewis account of position taken by Cole and Thorn at *Lewis'* orientation; and of Cole's additional statement there that he did not want to see the job go union, but not Thorn, as Lewis recounts Thorn said only this job was a nonunion job (Tr. 831–832). (The Union argues it was also consistent with Cole's instructions to S. Coon to be hard on Lucas after Lucas began openly organizing (Tr. 982–983) a matter considered below.)

Employer's *first* position is that Cole simply did not make any statement that had threatened employees with discharge if they selected the Union as their collective-bargaining representative. Employer alternatively, *second*, contends even if this statement occurred, it would be no more improper than Lucas' own statement that the Union had shut Putnam down (Tr. 398). Employer, *third*, argues even under Lucas' version, it was at most a friendly discussion about unions at a time when Respondent Company was not aware of any organizing activities, or Lucas' involvement in them. Employer, *fourth*, contends that Cole's statement, if made, is merely his personal opinion about unions which is not unlawful, with stated reliance on *Oklahoma Installation Co*., 309 NLRB 776 (1992). Employer, *fifth*, contends that this is just another instance of Lucas mischaracterizing his conversations with Brown & Root management. *Finally*, Employer has contended generally Lucas' allegations should not be considered because he forfeited his rights under the Act by engaging in illegal conduct.

Cole denied making these comments; and, he testified he did not have this kind of conversations (sic) with his employees (Tr. 3504–3505). Employer argues the record demonstrates Cole takes labor relations very seriously, and takes precautions to ensure the Act is not violated. At a foreman's meeting on March 7, 1990, the day Lucas gave management a letter of intent to organize, Cole told the foremen the same day, ''Gentlemen, you know that Tom Lucas is set up as a union organizer and he has done us a good job as a welder, we need to treat him as—just like we did last week. There's no difference, do not let it get in your way (Tr. 3491–3492).

When asked if he had ever talked with Lucas about unions, Cole stated that he had only one conversation which Lucas initiated, and that it was at a time when he did not

know Lucas was an organizer for the Union. (Brown & Root first became aware of the Union's (*formal*) organizing campaign on February 26, 1990, by union telegram from the Building and Trades organizing committee (Tr. 32; G.C. Exh. 3(a)), and first learned that Lucas was an organizer when he put on his union badge on March 7, 1990 (Tr. 34).) Cole's version is that in this earlier conversation about the Union, Lucas had casually said, ''I think Brown and Root needs a union, don't you.'' Cole told Lucas that he did not know, and asked Lucas why he was asking. Lucas said Brown & Root in the early 80s had fired and laid off people and so forth, to a point where people were going hungry and losing their houses and so forth. Cole answered he was in Texas at that time and he never missed any time (Tr. 3492–3493).

Cole's alternative account is inconsistent with credited evidence of record, which casts doubt on his denial. It not only compares unfavorably with Respondent's own records on the severity of Brown & Root's retrenchment in the period, earlier considered, of which Cole would surely (at least) generally have known, but the related ambiguity about the need of a union, flies in the face of credited testimony above as to what Cole had said about the job being nonunion, and, even his credited personal expression of viewpoint that he did not want to see the job go union, as stated in orientation within a month earlier about the Union. But most unacceptably, it calls for an acceptance that, at a time that Lucas has concealed his organizational activity, and McCormick has counseled Local 667's members to keep it quiet, Lucas is casually expressing to the general foreman, ''I think Brown & Root needs a union don't you?'' (Tr. 3493). I do not accept that; and, I do not credit his denial. Lucas is not shown to have engaged in any 8(b)(1)(A) or 8(b)(4)(i) and (ii) type misconduct, nor did he engage in any picketing beyond allowed 8(b)(7)(C) period. Nor do I find merit in Employer's other arguments, and, cf. *Shattuck Denn Mining Corp v. NLRB*, 362 F.2d 466, 469 (9th Cir. 1966). Rather, in this instance I credit Lucas' account, and I find that General Foreman Cole, after inquiring and being told of the Putnam union shop closure had then told employee Lucas, ''Well, I guess you know that if the Union gets in here, that none of us will have a job—or we'll all be out a job.''

Employer's reliance on *Oklahoma Installation Co*., supra, is misplaced. In that case the Board corrected an administrative law judge's improvident reliance on Board cases that had considered certain expressed viewpoints as coercive only because of coercive disloyalty context, that the Board found did not exist in *Oklahoma Installation*. That case is distingushable from circumstance presented here. More to point, the Union correctly observes an employer may make predictions, but such comments must not constitute threats of reprisal. The standard for evaluating such conduct continues to be the rule articulated in 395 U.S. 575, 618–619 (1969):

> An employer is free to communicate to its employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not constitute a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective facts to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at to close the plant in case of unionization. [395 U.S. at 618–619.]

In essential agreement with the Union then, the dispositive factor is whether Cole's remark was made in conjunction with any objective factual statements, or whether Cole's remark constituted a wholly unverified and unlawful threat of retaliation. Employer failed to present objective evidence supporting Cole's threat ''Well, I guess you know that if the Union gets in here, that none of us will have a job—or we'll all be out a job.'' Thus, I find Cole's statement constituted an unlawful threat, and clearly was violative of Section 8(a)(1), *NLRB v. Gissel Packing Co*., supra; *Adscon, Inc*., 290 NLRB 501, 517 (1988).

6. The start of the formal union organizing campaign

a. *Lucas' union activity*

Lucas recalls that shortly after Pipe Foreman Cole had told Lucas he was doing a really good job (Tr. 402), Lucas decided to get involved in organizing a union assertedly because he was dissatisfied with the way that the Employer was treating its employees (Tr. 403). The fact is, however, Lucas had been authorized internally by the Union a month earlier to accept employment with nonunion Brown & Root to organize the Company. Lucas has otherwise testified credibly he received no monetary compensation from the Union for organizing on their behalf (Tr. 442). Lucas first met with Thomas and personally signed an authorization card for Boilermakers Local 667 on March 5, 1990. (The card that was identified was G.C. Exh. 13; Tr. 414. When it was later determined G.C. Exh. 10(q), however, the original Lucas card, was a duplicate exhibit of G.C. Exh. 13, G.C. Exh. 13, was then withdrawn (with all party approval) as original authorization card was already in evidence as G.C. Exh. 10(q); Tr. 418; and, I so find.)

b. *The authorization cards*

Lucas' union activity began with some discussions about the Union with other employees after work at a local restaurant. Lucas signed his card there on March 5, 1990, and received some authorization cards to solicit others to sign, which Thomas has essentially confirmed. Starting the next day, March 6, 1990, Lucas distributed some of the union authorization cards to Brown & Root's employees at the plant and/or at the restaurant; and, Lucas testified that he obtained some signed authorization cards back there (seemingly the restaurant). Lucas relates generally certain employees signed the cards and returned them to Lucas; and he then turned the cards into Thomas.

Of the 18 authorization cards (G.C. Exhs. 10(a)–(r)) which were turned in to Thomas, only 10 have Lucas' initials on the back. Lucas has identified those 10 cards (G.C. Exhs. 10(b)–(d), (h)–(k), (n), (o), and (r); Tr. 414), as the cards that he had personally solicited (and obtained) signatures on. Only 1 of those (10) authorization cards (with his initials) was signed on March 6, 1990. The other nine that Lucas initialed were signed much later in the year, five on November

14, three on November 20, and the last one on December 4, 1990.

To the extent employee Lewis has recalled he signed an authorization card for Boilermakers Union on March 5, 1990, he misrecalls. The card he signed, (G.C. Exh. 10(j)), is dated March 6, 1990, and it thus conforms with Lucas' account, which Lewis otherwise confirms (Tr. 800–801). Lucas' initials are on Lewis' card, which Lucas had placed on cards that he had received back from employees. Lewis otherwise (only) related that a(n unidentified) foreman from Brown & Root was present in the restaurant in the booth behind them and saw Lewis there (Tr. 801). The complaint does not allege Lewis as an alleged discriminatee.

Supervisor presence at the restaurant was not pursued. That may well be because on the next day, March 7, 1990, Lucas began to campaign for the Union openly at the Brown & Root jobsite. Lucas obtained signed authorization cards from others, with (at best) modest success, and even at that, as shown next, essentially not so at first, and certainly not for some time after he openly campaigned.

An eleventh card, not bearing Lucas' initials, was Lucas own card, which he had filled out on March 5, 1990. Of the remaining seven authorization cards (that do not bear Lucas' initials), six in all were signed in a period from March 5 through April 3, 1990. The last was signed on September 29, 1990). In the material period of early 1990, i.e., when in the main independent complaint allegations occur, Lucas, on this record, was, as Employer argues in part, initially not succesful.

Otherwise considered, cards in use were multicraft, with block provision for designation of eight different specifically named crafts (none being Boilermakers), but with an additional indefinite (blank) block provison for any other craft designation. On cross-examination, Lucas confirmed authorization cards that he distributed were used by Charleston Building Trades unions, and included boxes that could be checked off on behalf of many unions, or the name of a union not listed could be written in, and then checked off on a box marked ''other'' (Tr. 561). Lucas' own card designation confirms Lucas' card use. It has Boilermakers Local 667 written in under other craft, and designated.

The 10 individuals whose authorization cards bear Lucas' initials are signed by individuals employed in several different crafts: electricians (three); insullator (one); ironworker (one); laborers (one); plumber (one), pipefitter (one); and welder (two). Nonetheless, Lucas reiterated he was a Boilermakers' organizer, but also explained, ''My understanding was, had the job went, it may have went buildings and trades, or it could have went strictly Boilermakers.''

c. *Lucas' distribution of union literature on March 7, 1990*

Lucas testified he also began passing out union leaflets and literature on March 7, 1990, in the parking lot. He passed out the union literature between 6 and 7 in the morning. Foreman Fitzgerald saw him passing out the literature as Fitzgerald was waiting to drive into work in one of the employee vans. At this time, Lucas gave Fitzgerald the letter from Thomas informing Brown & Root that Lucas was the chairman of the Boilermakers (employee) organizing committte (as earlier discussed), and organizing on behalf of the Union (G.C. Exh. 3(b); Tr. 420).

Called as the General Counsel's witness, Pribyl confirmed both receiving the Thomas wire February 26, 1990; and, that on March 7 or 8, 1990, Pipe General Foreman Oscar Cole gave him a letter he (as he understood it directly, but I find that Cole) had received (from Fitzgerald, who in turn) had received from Lucas about Lucas being an organizer for the Union (Tr. 34). (As the pipe and welding general foreman and Fitzgerald's immediate superior, Cole would have received (and did) any such letter turned into Foreman Fitzgerald, from Fitzgerald, and on other evidence, it appears more likely that, whether before or after checking it out with a visible inspection of Lucas, below, Cole (with Fitzgerald present) turned the letter into his superior, Pribyl (I find) that same day, March 7, 1990. The weight of credible evidence confirms March 7, 1990, was the date Lucas began to distribute union literature at the plant, and thus relatedly openly engage in union activities at the plant.

d. *Lucas wears union button at work starting March 7, 1990*

Though not without some record confusion as to date, Lucas, at least on one occasion recalled, and I find, that it was the day he handed the letter to Fitzgerald that he began to wear a union button at work (Tr. 421). The union button Lucas had worn to work beginning March 7, 1990, said, ''Boilermakers organizing committee'' and it had a Boilermaker symbol in the center (Tr. 422). Lucas also was a Boilermakers Local 667 volunteer organizer. I further find that Employer had clear, direct knowledge not only of Lucas' declared intent to engage in, and notice of Lucas' actual engagement in Section 7 protected union organizational activity at the plant starting that day, but clear knowledge of his position in leadership in that effort. Employer's response to open union organization at this time was immediate.

7. Company knowledge and reactions

a. *Pribyl's directions; and Cole's instruction to foremen*

Fitzgerald testified that when he and Cole went to Pribyl's office to deliver the Lucas letter on March 7, Pribyl first read the letter and then told them not to worry about it, and that he would take care of it. Pribyl told Fitzgerald to go on back to his job, and do just like he had been doing; and, do not treat Lucas any different than what you have been treating him (Tr. 2752–2753). Thorn, who was told by Cole of Lucas wearing the organizer button then contacted Pribyl, who told Thorn he already knew about it; and, Thorn testified Pribyl told him, to make sure that we did not treat Lucas any differently than we did anybody else (Tr. 4677). At the foremen's meeting (that Cole unclearly recalled was that morning or afternoon) but that included all the foremen Cole supervised, Cole told them, ''Gentlemen, you know that Tom Lucas is set up as a union organizer and he has done us a good job as a welder, we need to treat him as—just like we did last week. There is no difference, do not let it get in your way. (Tr. 3491–3492.)

b. *Pribyl's leaflet of March 7, 1990*

Lucas identified an antiunion leaflet that was supplied to employees by the Employer along with their paycheck on the same day that Lucas had turned in his organizing letter to

Fitzgerald and leafletted on behalf of the Union; (and had his job changed, below). The leaflet, signed by Pribyl and dated March 7, 1990, addressed to given individual employee, was supplied to employees by the Employer along with their paycheck on the same day that Lucas turned in his letter to Fitzgerald. The leaflet, in evidence as General Counsel's Exhibit 14, provides:

> I have received a Western Union message from a member of the Local Boilermakers Union notifying me that they and the ''Trades Council'' are ''actively organizing our site.'' These are the same individuals that have been outside our gate swearing at you, throwing cheese and other objects at our cars and, lining the roadway with roofing nails. They also have been blocking our entry/departure with ''flags,'' their ''slow walk,'' vehicles, etc., apparently trying to cause a highway accident.
>
> They have made repeated charges to local groups and the Press that we are hiring ''75% to 95%'' of our workers from outside West Virginia. Do you believe their statements. They now say their 18 separate Unions will ''welcome you into their fold,'' and indicate they will offer you future lifetime employment.
>
> No Union ever offered a position to any worker except for their local and national employees on the ''Union payroll.'' Construction jobs are created when the successful competing contractors have received a contract from a client.
>
> The Union organizers will be making many claims and promises to you. Keep in mind they cannot guarantee any of their promises. They are trying to ''sell'' you something, Union membership.
>
> Organization cards are legal obligations. You should be very careful about signing something which may obligate you or commit you into something quite serious.
>
> All of the 18 Unions in their ''Trade Council'' have separate lengthy ''constitutions'' and detailed local ''bylaws.'' You should be aware of the lifetime financial and regulative restrictions you would be subject to when you take an ''oath-of-membership'' to these varied organizations.
>
> We ask you to bring any questions on Union organizing or ''cards'' to us and hear our side. We don't need a Union, we don't want a Union, and I know we will be better off without a Union.

The complaint does not allege that the last paragraph has in any manner violated the Act.

c. *Foremen reaction on the job as viewed by Lucas*

On March 7, 1990, the day when Lucas became open about his support for the Union, and began wearing the ''Boilermakers organizing committee'' union button, when he came to the job, Cole came up to him, said, ''Lucas, you going to do anything today; and when Lucas responded he would try, Cole gave Lucas ''a good 10 seconds stare at that button'' (Tr. 422).

d. *Fitzgerald's last weld remark; alleged isolation*

It is convenient to discuss two complaint allegations together. Complaint paragraph 5(b)(ii) alleges Respondent, acting through Foreman Fitzgerald, on or about March 7, 1990, at a jobsite in Institute, West Virginia, threatened to discharge an employee (Lucas) because of the employee's activities on behalf of the Boilermakers Union; and, complaint paragraph 6(a) alleges essentially that on or about March 12, 1990, Lucas was assigned to an isolated work area to prevent him from talking with other employees about union matters. Lucas has complained relatedly (albeit, the same is not alleged in complaint); that Employer loaned crews, not single welders; that Employer discriminatorily put him on fire watch; and, that his nickname was derogatorily changed.

(1) The ''this is your last one'' remark

Lucas initially related that later that same day (March 7, 1990) Foreman Fitzgerald came up into Lucas' welding booth and said, ''Well that's your last one,'' which Lucas immediately believed was the last weld he would make for the Employer (Tr. 422). On other occasion Lucas recalled Fitzgerald looked at his weld, and said, ''[T]hat's your last one'' (Tr. 505). (On cross-examination, Lucas related Fitzgerald's alleged threat was, ''That is your last weld.'' Employer has established that in Lucas' prior affidavit given on April 27, 1990, thus much closer to the event, Lucas had then related the Fitzgerald statement as ''this is your last one'' (Tr. 507).

Lucas explained (why he initially felt he was being fired): there was nothing wrong with the weld he was working on; they needed welders badly; he could weld, fit, and fabricate pipe; he believed his skills and abilities were superior to other pipe crew welders, that he was faster; and, he had been told that he was doing a real good job (Tr. 592–593).

Lucas recounts that after that, ''[i]t was quite a while before I . . . did another weld. It was not my last weld, but it was quite a while before I worked on form piping'' (Tr. 505). Lucas has testified explicitly that there were more welds to be made on the job and there were more welders continuing to weld. That was not the last weld of the job. It was just that he did not make any more welds on that job (Tr. 506).

Lewis' initial version is on the first day that Lucas wore a union button to the jobsite, Lucas was a few minutes late getting to the area, Fitzgerald was even later. When Fitzgerald came into the area, Fitzgerald walked up to Lucas, put his hand in front of his face and told Lucas he had made his last weld on the job; and, Fitzgerald told Lucas to get his tools and all of his stuff gathered up; and Fitzgerald then took Lucas off into another area (Tr. 804). Lewis did not recall the date, but he was sure that it had occurred on the first date Lucas wore a union button on the jobsite. On cross-examination, when read Lucas account of the incident, Lewis then agreed that Lucas' account in his affidavit was accurate, and that was (what Lewis described as) getting up into his face. Lewis also thought Lucas was getting fired, because he was told to get his bucket, tools, and told that's his last weld, and you kind of figure that's his last weld. Lewis acknowledged that by the end of the day he knew that Lucas was not fired (Tr. 851). I find the remark made was probably as stated in prior affidavit, namely, ''this is your last one,'' which Lucas (and Lewis) took to mean Lucas was fired, but which was promptly shown but prelude to change of Lucas' job assignment by an uncontested insensitive foreman.

It is the General Counsel contention nonetheless, that in the context of the hostile reaction to Lucas from Cole and Fitzgerald, and coming on the first day Lucas wore a union button to work as well as the day Lucas first gave written notification to Fitzgerald that he was organizing for the Union, this remark is a thinly veiled threat to discharge Lucas because of his recently revealed union sympathy and activity.

Employer appears to acknowledge Lucas had assumed at the time that this comment of Fitzgerald meant it was the last weld that Lucas would make for Brown & Root (Tr. 422). In any event, Employer's position is that Fitzgerald did not say that, and all that Fitzgerald thereafter did was to assign Lucas to different duties. Lucas was obviously wrong, as he continued to work for Brown & Root through November 1, 1990, when he was laid off (Tr. 473). In reality, as Lucas testified, it was the last weld Lucas made that day. For the remainder of the day Lucas stood firewatch, picked up, cleaned, and did odd tasks (Tr. 509). (Employer would have it relatedly observed that it is undisputed that Brown & Root cross-utilizes its work force; and Lucas has acknowledged in his 9 months of employment, he had done different jobs; he has fit pipe, connected pipe, ground and burnt, and did basically steel work (Tr. 510); and, depending on the work available, Brown & Root employees may perform a variety of duties. It was (only) the last weld Lucas made that day, not his last weld on the job. Employer has shown Lucas made many more welds in the 8 months he worked thereafter, surviving two intervening reductions in force.

But Employer defends even the comment on basis Fitzgerald was a strong-willed, difficult personality whose focus was on getting the job done, and who generally did not get along with his employees. There is much, and convincing evidence to support Employer's position that Fitzgerald was insensitive in his relationship to employees in making assignments to get the work done. Employer makes the point, tellingly so, that on cross-examination, Lewis characterized this very incident as an example of Fitzgerald's poor attitude toward employees generally (Tr. 838–839). The record reveals both supervisors and rank-and-file employees (union and nonunion) perceived Fitzgerald as an insensitive person who was hard on everyone, not just on union supporters.

Lewis more definitively testified Fitzgerald's attitude toward employees was ''pretty bad, pretty poor; I mean, he had a bad attitude about everything 90% of the time'' (Tr. 838); and, he was more than a tough boss—he was very demanding and insensitive to people and their feelings (Tr. 840). Lewis gave example of getting a reprimand for not giving advance notice about needing time off to have a toothache treated that developed over night; and, Lewis admitted that Fitzgerald's bad attitude was not union related (Tr. 839).

Employer argues generally that many of Lucas' complaints stem from his poor working relationship with Fitzgerald. Employer contends, however, that it is also clear from the record that Fitzgerald treated Lucas no better or worse than he had treated all other employees. Employer relies heavily on a record established fact that Fitzgerald's supervisory style was one rough on everyone. Thus, Employer argues there are a number of allegations made against Fitzgerald by Lucas and others which have nothing to do with this case, but are reflection of Fitzgerald's difficult personality.

A number of employees have testified regarding Fitzgerald's consistently poor working relationships with them. E.g., pipefitter Dana Mikeal testified Fitzgerald was neither a likeable guy, nor a good person, nor people-oriented; and, it was not unusual for Fitzgerald to fly off the handle when someone did something contrary to his wishes (Tr. 3255). Fitzgerald was not a bad foreman; he just was not a good person; he did not seem to be very people oriented. Once, Fitzgerald told Mikeal that ''he didn't come there to make friends; he came there to get a job done. He didn't care if he didn't have any friends up here or not'' (Tr. 3237). Mikeal affirmed he saw Fitzgerald give Lucas a hard time, but that was not significant (to him) because Fitzgerald gave everyone a hard time (Tr. 3237). Mikeal specifically testified Fitzgerald did not give Lucas a harder time than he gave to any other Brown & Root employee; and he never saw Fitzgerald (or any company supervisor) give any Brown & Root employee a hard time because he was a union supporter (Tr. 3238).

Welder ''Wormy'' Sanson corroborated (Tr. 3267). Sanson described his relationship with Fitzgerald as a ''personality conflict.'' Though denying Fitzgerald had an explosive temper, Fitzgerald nonetheless ''rode'' Sanson; and, Sanson confirmed Fitzgerald rode everybody (Tr. 3279). Sanson thought about quitting because of Fitzgerald; and, he knew of at least one employee who did quit because of a disagreement with Fitzgerald (Tr. 3267–3268). This did not affect the work assignments Fitzgerald made (Tr. 3280). Sanson testified Fitzgerald was a good supervisor in the sense that he would get the job done (Tr. 3267). Sanson added he ''just didn't know how to treat people'' (Tr. 3266).

Fitzgerald's supervisor, Oscar Cole, confirmed that he received a number of complaints about Fitzgerald's personality. Cole testified almost everyone who worked for Fitzgerald had complained that he was ''too rough on his people.'' Cole testified Fitzgerald was a ''strict supervisor, but he was a stickler for safety and company rules and company policies and he—he was not hard on one person, he was—he was a little hard on all of them'' (Tr. 3508). Cole testified, however, that there were no other foremen under his supervision that he had to talk to so much about employee complaints (Tr. 3518).

Cole always investigated the complaints, and he reported the complaints to his supervisor, Penrod (Tr. 3518). Other than complaints by Lucas, he recalled complaints by employees Murphy and Gottman (Tr. 3508). Lucas and Murphy both had complained that they were getting leftover jobs that were not good enough to work on. Like Lucas, Murphy wanted to weld on pipe, not on iron plate, but (at the time) there was not any (Tr. 3508). Thus, when Cole followed up on the complaints, Cole had always found the assigned work was what was available, and needed to be done at the time (Tr. 3509). (Cole had a method of tracking how much pipe an employee had been welding and the amount of welding work load that was available (Tr. 3518).) Cole did not see anything wrong with Fitzgerald's job assignments (Tr. 3533).

Employer would relatedly have observed that even though Lucas' union organizing efforts were matter of public knowledge, *Fitzgerald* continued to allow Lucas to practice heliarc welding to prepare for a heliarc certification test. Lucas never did pass the certification test for heliarc welding, though Lucas took the test several times, and was allowed

to practice weekly on the job (Tr. 2728–2729, 2764). Employer contends, both Lucas and Lewis simply leapt to a conclusion that was not warranted. Employer argues legally, that while the comment may be viewed as vague or ambiguous, it is not unlawful. *Ohmite Mfg. Co*., 290 NLRB 1036, 1037 (1988).

Although the timing of the remark ''this is your last one'' preceding an unannounced job change, is suspicious, the remark's ambiguity, without Lucas questioning of it, and but assumption, an assumption that was almost as quickly dispelled by other assignment, leads me to agree with Employer, that the making of this remark, considered by itself, is too indefinite and/or ambiguous in meaning, and was not violative of Section 8(a)(1) of the Act. The subsequent changes in assignment is another matter of complaint allegation, that in the end, I find also without merit.

(2) The isolation allegation; and related Lucas complaints

Lucas testified after Fitzgerald said that ''[t]hat was your last weld on March 7, 1990,'' he did not make any more pipe welds for quite a while after that; and, he testified that he was assigned cleanup jobs, or ''piddly jobs'' (Tr. 580). Lucas, however, did work interimly on a tank for a while which he described as being more boilermakers' work, than pipefitters' work, as he knew it (Tr. 580). The essentially jurisdictional disfavor of the latter job, as a work assignment, is without merit.

The iron handrail work; and assignment to the VGI yard

In early 1990, Rhone-Poulenc had directed Brown & Root to fabricate and install a loading dock on the river behind the plant (Tr. 1061–1063, 3146–3147). Another contractor had previously begun this project. Rhone-Poulenc, however, was dissatisfied with the work done, and, it directed Brown & Root to complete the job as soon as possible. This project was just one of many special short-term projects which Brown & Root handled on an as-needed basis and which often required temporary assignment of employees with specific skills. The iron for a 24-foot (double) handrail construction was at the VGI yard and there was easy access fabrication there, etc. (Tr. 1061).

Foreman Stephen Coon and his crew were assigned to the project (Tr. 1060), which took 2 weeks to complete (Tr. 3133). In early March, Coon requested a temporary loan of a welder to weld a pair of prefabricated handrails (Tr. 970). Fitzgerald selected Lucas for the loan to Coon's crew to do that work because, of the four welders in Fitzgerald's crew, Brian Gottman was already loaned to another crew; and Fitzgerald needed to keep the other two welders available for upcoming *heliarc* welding that Lucas was *not* qualified to perform, so he kept welders, Joe Johnson and Sanson, to do that work. Lucas was the only welder on Fitzgerald's crew who was not certified to do heliarc welding (Tr. 2740–2741). (Coon's testimony of Lucas being overqualified for the iron handrail job does not alter that fact; nor does the fact that Lucas was an ASME code certified pipe welder, where he was not qualifed for the heliarc welding.

Employee Robert Evans, a cross-skilled journeyman, employed as fabricator, has corroborated Fitzgerald's testimony. Evans recalled (then) Foreman Coon's own fitter/welder Everett Neal, and his helper Kevin McGee were being used down near the river, fabricating and installing brackets for a gang plank in a floating dock (where the handrail would go when constructed). Evans otherwise confirmed generally that because the other welders were slated for current or future projects, Lucas was the logical choice (Tr. 3132–3133).

Employer observes that at trial, Lucas had claimed that Brown & Root only loaned out entire crews, and his individual transfer was designed to thwart his organizing activities. Employer contends, and shows this is erroneous. Thus, Fitzgerald testified he frequently loaned out individual welders on an as-needed basis (Tr. 2741–2742). In fact (as noted) he had Gottman out on loan at the very time. Sanson confirmed he was loaned out twice to other crews, and that he has seen other welders loaned out from time to time as the need arose (Tr. 3273–3275). To extent Lucas has made a claim that Brown & Root only loaned out entire crews, he is in error, and the claim is without merit.

The General Counsel's main argument made is that Employer sought to isolate Lucas by a work assignment in the ''VGI yard.'' On March 12, 1990, Lucas was reassigned from Fitzgerald's pipewelding crew to (then) Foreman Stephen Coon's iron crew to perform the welding on handrails to the gang-plank project. Coon took Lucas to the VGI yard, where Lucas stayed till about the end of March, or (I find) about 2 weeks (Tr. 426–427). Lucas was one-fourth to one-half mile from the rest of his pipe crew (Tr. 457).

The Union would have it observed that immediately after Lucas began openly organizing, corporate Brown & Root's Max Kennedy had returned to the Rhone-Poulenc facility to give one of his seminars on preventive labor relations policies (e.g., in March 1990, in which he went over the dos and donts) (Tr. 2252–2253). The Union contends it was immediately thereafter Lucas was transferred away from the rest of his crew.

Lucas' complaint is that previously when Lucas had moved from job to job, it was with his whole crew. When Lucas was transferred to Coon's crew their work still remained to be performed in an area where he and his crew had been working. Lucas' crew worked in the same area for a few weeks after Lucas was transferred to Coons' crew (Tr. 454). Prior to being moved, Lucas regularly interacted with the 30 or so employees on his crew (Tr. 456).

The material part of the project to which Lucas was assigned, was the fabrication of two iron handrails to OSHA standards, and it was set up to be done in the vent gas incinerator laydown yard (VGI yard). The VGI yard is about half the size of a football field (Tr. 3136, 3503–3504). In addition to being a worksite, the yard served as a storage and fabrication area for iron, steel, and pipe which employees retrieved as needed throughout the day (Tr. 3139–3141). The handrail work was to be done there for (I find) permit, and other valid business reasons. E.g., in addition to the supplies being there, there was a print shack there, a tool and equipment box, a fabrication shop, and *a welding houtch already set up* in the VGI yard (Tr. 1064, 3130–3131). (A houtch is a temporary shelter which contains fabrication table and protects welders and their materials from bad weather; and, it also shields the work from affecting others (Tr. 3149).)

The use of the VGI yard area permitted the work once laid out not to be interrupted, or required to be moved, thus en-

hancing the handrail construction that would meet OSHA standards. The case is not made that the gang-plank could have been welded in the 1021 laydown yard, where the pipe crew was welding, and done more efficiently. In point of fact, Lucas completed his special welding assignment in VGI within 5 days; but Coon kept him for the remainder of the 2-week period to perform miscellaneous jobs after Lucas told Coon that he liked working for Coon, and that he wanted to continue working on his crew (Tr. 1083 (24–25)). Coon rated Lucas' work as a welder while he was on Coon's crew as ''excellent;'' and Coon described Lucas as being overqualified for that job.

(3) Employer's defense of the 8(a)(3) ''Isolation Allegation''

Employer defends Lucas was loaned to another crew for 2 weeks to work on a special emergency project. Employer contends that Lucas' claim that he was assigned to this project to isolate him from other employees and to thwart his organizing activities is belied by the record. His skills made him the logical choice of the welders available at the time. Employer contends the Company's motive was proper; and, in any event, the job was not isolated.

Fabricator Robert Evans, who was assigned along with ironworker helper Kevin McGhee to assist Lucas while he was on this project (Tr. 1064), testified that many other employees worked in and around the VGI yard during Lucas' assignment there. E.g., equipment operators congregated in the VGI yard while waiting for assignments; and, three to four times a day employees came into the VGI yard to pick up pipe and materials stored near where he and Lucas worked; ironworkers Everett and McGhee worked in the VGI yard at stations next to him and Lucas; and Lucas frequently talked with fuel truck operator Mike Garrett while Garrett filled Lucas' welding machine (Tr. 3139–3140; 3142). Lucas also had access to employees working near the yard. Pipefitters, electricians, instrument hands, and insulators were working on the VGI unit directly across the road. These employees often stored their materials there, and sometimes they worked in the VGI yard (Tr. 3142–3144). They all used the same lavatory facilities, water buckets and smoke shacks as Lucas (Tr. 3144–3145, 3148). (Indeed, water buckets were located near Lucas' houtch (Tr. 3146).

Evans testified that he and Lucas took smoking breaks together several times per day and that three to five other employees usually took breaks with them (Tr. 3148–3149). Lucas admitted at trial that while he was assigned to the VGI yard, he enjoyed the same breaks and privileges as before (Tr. 528–529). Lucas rode with other employees in Brown & Root's van several times each day to go to the worksite, to the lunchroom, and to pick up equipment as needed. The van was almost always full (Tr. 3146–3147).

The General Counsel's witness Coon (then) foreman of the job, corroborated Evans' testimony that many employees worked in and around the VGI yard. E.g., he testified seven riggers stored equipment there and seven or eight insulation employees used the fabrication shop (in and out) throughout the day (Tr. 1061, 1065, 1067–1068). Coon testified, however, the normal flow of traffic would not pass by Lucas. Coon confirmed that Lucas regularly took lunch, smoke, water, and lavatory breaks with other employees. Thus Employer (fairly) contends although Coon was an adverse witness to Respondent, Coon could not deny that Lucas had access to other employees when specific questions were posed. Nor could he deny the truth of his statement in his May 1990 affidavit: *''I was never told that I was supposed to keep Lucas away from the other employees. And all I know was that I needed a welder and Lucas was sent''* (Tr. 1070–1071).

Finally, Coon asserted at hearing he was told Lucas turned in a letter as a union organizer in the office by Dennis Gohlke, Coon's general foreman, and in presence of Bob Berry, rigging foreman (Tr. 972); that Gohlke told Coon that Lucas was a union organizer; *and that if anybody was talking with Lucas, they were to try and find out what was being said and report back to him* (Tr. 973). Gohlke was no longer employed by Employer; and he did not testify. Berry did and denied it (Tr. 2826–2827) and see discussion below.

Moreover as noted above, Employer did establish that this asserted Gohlke instruction is directly contrary to Coon affidavit. Apart from inconsistencies also urged by Employer, though Coon may assert pressures at the time of giving affidavit in explanation of the statement there, under these circumstances, I do not rely on the alleged Gohlke statement, nor do I rely on such as tainting any normal work observance of crews at work, by Cole and Fitzgerald to the extent asserted by Coon, cf., *Well-Bred Loaf, Inc*., 280 NLRB 306, 310 (1986). (In general, at hearing, Coon has testified that although he had given affidavits to the NLRB during the investigation of these cases, he did not disclose all the incidents to which he was testifying because at the time he was a supervisor of the Employer and was scared for his job (Tr. 989–991). But in his prior affidavit, with regard to Lucas, he said he needed a welder, Lucas was sent, and *that's all he knew*.)

There is no complaint allegation that Brown & Root had discriminatorily assigned Lucas to gang-plank welding work. The allegation is that Employer discriminatorily sought to isolate him by a work assignment to the VGI yard. Employer thus contends that Coon's assertion that Lucas was isolated is not supported by the facts, and in light of his present (claimed) animosity toward Brown & Root, it is probably a recently acquired opinion.

To the extent Coon has testified that Lucas was designedly kept isolated, it would be in conflict with prior statement, and not persuasive in light of other credited evidence of record. I have no doubt that for this period of time Lucas had less access to other employees than that he had with his own crew of 30, but as far as this record shows work was required to be performed, there were business reasons to do it at the VGI yard, Lucas was the logical welder choice under the existing conditions, and in point of fact he was not wholly isolated; nor isolated beyond the period of the 5-day work assignment, indeed (after desired 2 weeks there) he was given lesser than desired welding work only to avoid a layoff during a work reduction period.

In agreement with Employer I find, the evidence does not support Lucas received a job transfer on March 12, 1990, for discriminatory reasons, nor that he was kept isolated, but rather it more appears he received an iron handrail fabrication assignment that was to be performed at the VGI yard for valid business purpose, *Certainteed Corp*., 282 NLRB 1101, 1123 (1987) (transfer of a union supporter shortly after

strike not unlawful because it was for legitimate business reasons, and because the employee was not really isolated).

To support contrary position, Lucas had complained he was deliberately paired with an employee with antiunion sentiments, namely, Robert Evans. This claim is without merit. Employer observes accurately it was Coon who selected Evans to work with Lucas (Tr. 1064, 3128), who had disclaimed any instruction to watch Lucas (in his affidavit). Evans was a 16-year member of the UAW (Tr. 3122–3123). Employer observes while Evans may have opposed the union organizing Brown & Root's employees, there is no evidence that Brown & Root knew of his opposition, or that his opposition was ''virulent.'' Even more to the point, I am persuaded, Respondent had no obligation to pair Lucas with a known union sympathizer, assuming others working in the area were so identified, and known to the Employer, but to assign work nondiscriminatorily. Evans was assigned to help Lucas do the work.

Similarly, as to the alleged inability of others working in the area to see inside the welding houtch when Lucas was working, it is a familar truism that work time is for work; and, Employer had no obligation to allow Lucas to engage in other activities or interact with other employees while actually engaged in welding duties, which Lucas did while inside the houtch. But, as Employer noted, Lucas interacted with employees during his worktime, both inside and outside the houtch, when he was not actively welding.

(4) Lucas' other assignments, fire watch, and odd jobs

Lucas testified that after making that last weld on March 7, Lucas did little things such as standing on fire watch, picking up things, cleaning up, and little odd jobs (Tr. 509). (Lucas explained what he meant by fire watch. When there is a fire hazard, they have a man stand on a water hose in case he needs to put the fire out. Fire watch only takes place when you have people doing hot work, such as welding, burning, grinding, and things like that. Lucas has testified that while you were on fire watch, you were unable to leave the area and talk to other employees (Tr. 593).)

Lucas contrasted this to his normal duties which took in more than just welding. Normally when he was not welding, he would fit pipe, connect pipe, grind and burn, and do other steel work (Tr. 510). It was rare that he would just stand on a fire watch. Lucas testified that he was the only welder he knew of who had to stand fire watch at Brown & Root (Tr. 594); and, that before Lucas stood his first fire watch (there), only helpers were assigned to the job (Tr. 594). Lucas has also testified that on past jobs where Lucas had worked, he had never seen a certified pipe welder stand fire watch (Tr. 593); and, he asserted usually, a mechanic was assigned to fire watch.

As a matter of fact, Lucas testified that after he had put on his union button, he stayed on fire watch quite a bit. Lucas, in comparison, summarized, for the first 6 weeks he was employed there, he did not stand fire watch, but after Lucas put on his union button, for the remainder of his employment, some 7-1/2 months, he did quite a bit of fire watch (Tr. 511). Lucas, on redirect examination, has also testified that the job of standing fire watch was not as desirable to him as his usual job of welding (Tr. 578). Lucas explained that, ''the days seem to linger on forever when you are on fire watch.'' Perhaps even more significantly, Lucas testifed that Foreman Fitzgerald had previously told him that they would never assign a journeymen such as himself to a fire watch detail (Tr. 578).

It is Employer's position that at trial, Lucas asserted a multitude of other complaints in an attempt to bolster his unfair labor practice charges. Employer argues that many of these allegations concern statements or conduct which, even if they happened as alleged, show nothing unlawful or improper; and/or simply did not occur. One such complaint raised was specifically that Lucas had to perform fire watch duty for 2 weeks after he had finished his assignment at the VGI Yard. Fire watch is a safety measure required for permits at Rhone-Poulenc and most chemical plants. An employee standing fire watch has a water hose and a fire extinguisher, and monitors the workplace for outbreaks of fire.

As the record reflects Lucas has (essentialy) admitted that after he returned from VGI there was a layoff in early April, and, however reluctantly, that he would have been laid off, but for fire watch (and some other, lesser nonwelding) assignments, before welding work picked up in another couple of weeks (Tr. 607–608), I further find that Lucas complaint that he stood fire watch more than usual after he put on his union badge and that other welders did not stand watch as much, is without supportive merit for the violation urged in the complaint. (The complaint does not allege that Lucas was treated disparately in receiving fire watch; and, if to be regarded as so litigated, I further find there was additional credible testimony establishing other welders performed fire watch and were cross-utilized (Tr. 2757, 510, 1046, 2852, 3499–3500); and, thus, I would further find that allegation also to be without merit.)

In regard to Lucas complaint that after he wore his union button that Fitzgerald quit calling him a purported friendly nickname of ''wetback,'' and, began calling him a pejorative ''chico,'' I decline to enter that unalleged thicket. (E.g., according to Lucas, reference to ''wetback'' meant someone who came from a union background, but had swam the river and went to work nonunion (Tr. 405); and, thus change over name to ''Chico (at least) to Lucas had some union significance.)

If however, I am somehow in error in the matter, I would credit Employer's evidence that it is commonplace for the employees in the construction industry to give each other nicknames (Tr. 3155–3157), which Lucas has acknowledged; that some nicknames given by others (admittedly) are less complimentary than others (Tr. 499). For example, the Installation General Foreman Al Moses was called ''Pork Chop;'' and, pipefitter helper Bostick was (also) called Chico. Welder Rodney Swanson was called ''Wormy'' (Tr.3270); and fabricator Evans was called ''Grouch,'' ''Old Man,'' ''Rebel,'' and ''Damn Rebel'' (Tr. 3156). Evans has confirmed that people called Fitzgerald both ''Wetback'' and ''Juan Valdez.'' Moreover, Evans recalled that it was Sanson and one of his helpers who initially gave Lucas the names ''Wetback'' and ''Chico.'' Under all these circumstances, I would continue to find no support for the alleged violation in the use and change of nickname.

Employer states Gohlke was not available as a witness as he no longer lived in the area and no longer worked for Brown & Root (Tr. 5033–5034). In direct contrast to Coon's assetions, Supervisor Bob Berry testified that he, Gohlke, and Coon met frequently before work to discuss the day's duties

(Tr. 2825). Berry specifically testified that he recalled Gohlke telling him and Coon that Lucas was an organizer; however, Berry denied that Gohlke ever told him or Coon to watch Lucas and/or report on his actions and discussions (Tr. 2826–2827).

8. Lucas' March 13 bulletin board posting

Lucas testified that as part of his union organizing activity, he posted union literature on the bulletin board, or at least, an area of the wall used as a bulletin board in the lunchroom. Lucas posted the Union's bylaws, its assessments, fees, and dues of the Union in that area. He posted the material in the morning. By noon, it had been removed (Tr. 430). Lucas also gave examples of other employees who had posted material prior to the time that Lucas had posted the union literature on the bulletin board (Tr. 585) in explanation of his postings.

Brown & Root had a long-standing bulletin board policy prohibiting the posting of unauthorized materials (Tr. 1969–1970, 4906). Following any improper posting, Employer would remove the materials and remind employees of the rule (Tr. 1970, 1974, 4908). Prior to Lucas' improper posting, there was prior improper posting at the start of the job (1970–1971, 4906–4907); and consistent with the Company's practice, Brown & Root issued a reminder memo to employees following Lucas' posting, just as it had issued an oral reminder following an improper posting at the beginning of the job.

The same day that Lucas posted union material on the so-called bulletin board, Lucas received a notice along with his paycheck as did other employees. The notice is in evidence as General Counsel's Exhibit 3(c). The General Counsel summarizes it warns Brown & Root's employees to limit the things they are posting on the bulletin board and basically restates Employer's rules viz-a-viz posting things on the bulletin board (Tr. 431). The General Counsel does not contend that Employer's no-solicitation, no-distribution; and no posting rules, violate the Act. The rule itself locally is not written, but delivered orally in orientation.

Lucas posting of the above union material on the bulletin board area on March 13, 1990, and his stated reasons in justification for doing it, contrary to the rule given him in orientation; Employer's reaction to it, and reissuance of a reminder, as in the past, in my view, are all matters that are competent evidence of: his continued union activity; Employer's direct awareness of it; the reason for his posting union material contrary to the Employer's rule; and, also, Employer's nondiscriminatory forebearance.

9. The allegation Employer sent Lucas home early for a day, and, Thorn's alleged coercive remarks about the Union

The complaint paragraph 6(b) alleges that on or about March 14, 1990, Respondent sent its employee Lucas home early for the day. Under paragraph 6(b), the General Counsel contends Respondent discriminatorily enforced its facial hair policy against Lucas which resulted in his being sent home for the day.

On March 14, 1990, after Lucas reported a safety concern about certain paints in his work to his foreman, Lucas asked to and then reviewed certain Material Safety Data Sheets (MSDS) in the office on substances to be found in certain paints in use. (Lucas had requested the information on the chemical composition of the paint on pipe he was welding (Tr. 433, 4704–4705); and his supervisor, Fitzgerald, took him to Thorn's office where he reviewed the MSDS (Tr. 433–434, 4705). After he had reviewed the materials, Thorn told Lucas he needed to shave because his beard was too long. Thorn gave him a razor and told him there was soap and water in the men's room (Tr. 433–434). Lucas relates that Foremen Thorn and Fitzgerald, looked at him, ''kind of grinning,'' told him that he was going to have to shave because his beard was too long.

Lucas stated that after he shaved, he gave the razor to Thorn who dropped it in the trash can. Lucas relates that Thorn then told him that he had to go home to trim his mustache (Tr. 434). Lucas said if you had told me, I would have taken the razor and trimmed it a little, but Thorn said he did not have another one, and Lucas refused to dig the razor out of the trash (Tr. 434–435). Lucas' claim, however, is that he should not have been required to trim his mustache because it did not hang below the corners of his mouth. Employer asserts Lucas' testimony that he refused to dig the razor out of the trash after Thorn told him to go home makes no sense which supports Thorn's testimony that he gave Lucas the option of trimming his mustache either on or off the premises.

Thorn testified he did not know what Lucas did with the razor. According to Thorn, however, Lucas had said, ''Well, I can't use a razor to do that.'' Thorn told Lucas he did not have mustache trimming tools, he only had large bandage scissors designed to cut heavy cloth (Tr. 4708). When Thorn showed them to Lucas, they agreed that they were too big to use on Lucas' mustache (Tr. 4707–4708). On cross-examination, Lucas admitted that he asked Thorn about scissors for his mustache after he shaved his beard, that Thorn told him that he only had large bandage scissors and that they agreed those scissors were too big to trim his mustache safely (Tr. 541–542). Employer asserts that Lucas' omission of these facts on direct masked the fact he had options other than leaving the plant. I do not agree.

Because he had no other tools and Lucas had said he would not use a razor, Thorn told Lucas that he would have to leave the plant, trim his mustache, and come back to work (Tr. 4709–4710). Thorn has testified that he kept a number of razors on hand and that he could have given another one to Lucas had Lucas asked (Tr. 4691). Thorn took Lucas to brass out and then drove him to the gate (Tr. 4709). (In lieu of timecards, Brown & Root uses a piece of metal, i.e., ''brass,'' to track when employees are on the job (Tr. 435).)

Employer further argues even Lucas' account of the events of March 14 do not show that he was sent home from work for the day. Lucas left to trim his mustache at 9:30 a.m. and did not return to work that day (Tr. 436). He claims that Thorn forced him to clock out and lose a day's pay. Employer asserts, there is no evidence anywhere in the record, including Lucas' testimony, that he was ''sent home for the day,'' as alleged in the complaint. Thorn's testimony refutes this allegation.

Brown & Root's facial hair policy provides:

> 1. [N]o beards are allowed;
>
> 2. [S]ideburns must not extend below a line even with the bottom of the ear lobe;

3. [M]ustaches must be neat and trimmed and must not extend below the corners of the mouth; [and]

4. [E]mployees [must] be cleanly shaven each day they report for work.

The Rhone-Poulenc plant produces several highly toxic gases, four of which are classified as ''Immediately Dangerous to Life or Health'' including MIC (Tr. 4678). As a result, every person at the plant must be able to safely wear a respirator. This requires that no facial hair interfere with the seal of the respirator (Tr. 4707). Employer's above facial policy is designed to ensure that respirators seal properly in the event of a gas leak.

Thorn testified credibly all supervisors were generally responsible for enforcing the facial hair policy, but for Thorn, it was a primary function of his job; and he has ''safety tunnel vision.'' Unlike other supervisors, who evaluate manpower, project future work, make bids, monitor safety, and perform various other job duties, Thorn's responsibility is limited to safety and health in the workplace. As Brown & Root's Safety supervisor, Thorn, monitored enforcement of the policy by conducting weekly safety meetings and field inspections, as well as random inspections as employees reported for work in the morning (Tr. 4687–4690).

Thorn testified that the discipline he imposed for facial hair policy violations depended on whether the employee was a first time or repeat offender. With first time offenders, he usually reviewed the terms of and reasons for the policy and offered the option of correcting the problem at the plant, or, the option of leaving the plant to correct the violation and returning to work (Tr. 4691). Repeat offenders were required to correct the violation, either on-site or off. In some instances, repeat offenders were also issued a safety violation notice, or a formal written warning, depending on the number and the frequency of previous violations (Tr. 4692–4694).

Significantly, Lucas acknowledged that he had a problem with a 5 o'clock shadow because he shaved the night before going into work to save time in the morning when he was getting ready for work. (Thorn and Fitzgerald have had occasion to speak to Lucas about his beard and had required him to shave prior to the incident in question (Tr. 439, 2757–2758, 4709–4710).) But Lucas testified he regularly saw other individuals with beards a lot worse than his that looked like they needed to be shaved, and they were never asked to shave (Tr. 463).

When they (sic, Thorn) gave Lucas a razor, Lucas went into the restroom to shave his (5 o'clock shadow) beard without incident, other than that Lucas describes their Thorn's and Fitzgerald's reaction as being quite happy he had to shave, and smiling as he left for the restroom. Lucas went to the rest room, shaved, and then returned to the room after shaving his beard. Lucas is firm that it was not until then, indeed, not until after Lucas had returned the disposable razor to the foreman (sic), who had dropped it into a trash can, that Thorn had then mentioned, ''*Now, you are gonna have to go home and trim that mustache*'' (Tr. 433–434).

Lucas testified as firmly that his mustache did not interfere with his ability to wear any respiration equipment available at Brown & Root on March 14, 1990; and, he reiterated categorically, that prior to the time that he went into the restroom to shave off his facial hair at Thorn's direction, no member of management, not Fitzgerald or anyone else, had told him that his mustache needed to be trimmed, testifying flatly that (subject) did not come up until after he came back from shaving (Tr. 596). I credit Lucas in that regard.

Lucas also testified that before he announced he was a union organizer, Thorn and Fitzgerald had seen him on the job every day and had never asked him to shave, even though his mustache was generally in the same condition before his announcement as it was on the day that they told him to shave (Tr. 439). Employer establishes several weeks before March 14, Thorn had required Lucas to shave at the plant (Tr. 4709–4710). Fitzgerald testified, and Lucas agreed, that Fitzgerald had spoken with Lucas (before) about his mustache being too long and Lucas had trimmed it, but without having to go home (Tr. 439, 2757–2758).

Thorn testified that after reviewing the MSDS information with Lucas, he and Lucas started talking about respirators that Lucas wanted the Company to purchase (Tr. 4706). This led Thorn to think about the hazards associated with respirators and the measures taken to protect employees, including requiring employees to be clean shaven to ensure a good seal (Tr. 4707). He noticed that Lucas appeared not to have shaved for a couple of days. When he pointed this out, Lucas admitted he was in violation of the policy (Tr. 4707). It was then Thorn told Lucas he had to shave, either onsite or off, and gave him a razor to do it (Tr. 4707). In the end, Thorn required Lucas to leave the plant.

Employer argues, however, the record clearly shows Thorn did not ''force'' Lucas to leave the plant for the rest of the workday. In fact, Thorn had suggested that Lucas go to a convenience store a few miles away to buy tools, trim his mustache, and come back, so he would only lose one-half hour of work (Tr. 4710). Lucas claimed that he did not have any money to buy the scissors and therefore had no choice (Tr. 544–545). He did not, however, ask Thorn or anyone else to loan him the money (Tr. 4710). Instead, Lucas went to take pictures at the Building Trades office to build the Union's case. The next day he claimed he had had car trouble which had prevented him from returning to work (Tr. 609). In reality, Lucas simply decided to take the rest of the day off.

The Union argues correctly, discriminatory enforcement of work rules violates Section 8(a)(1) and (3), unless the Employer can show that it would have enforced such rules in the absence of the employee's protected activities. For example, an employer's requirement a union adherent wear a hair net, without requiring the same of other bakery employees, violated the Act. *Hansen Cakes, Inc*., 242 NLRB 472 (1979). It is Employer's position that Lucas clearly was disciplined in accordance with the Company's established practices, which is not violative of the Act. *General Motors Corp*., 235 NLRB 49, 50 (1978).

The General Counsel contends that in Lucas' testimony regarding application of the facial hair policy there is some additional evidence of antiunion animus expressed by Respondent's safety supervisor, Thorn, that day. According to Lucas, on this occasion Thorn told Lucas he wanted to talk to him about the Union before he went to ''brass out'' (leave). Lucas, however, told Thorn that he would talk to Thorn after he ''brassed out'' (Tr. 435). As Thorn was driving Lucas out to the area where Lucas would get into his car, Lucas testi-

fied that *Thorn told Lucas there was a new way coming and the unions were not the new way, that they were the old way of doing things* (Tr. 436). *He went on to say that the Union's usefulness was over with.* Lucas responded he felt the old way was nonunion and the new way would be union, ''not the company rolling them in, but the men having some say-so in how they're being run.'' According to Lucas, *Thorn then said, ''[T]hen they had agreed to disagree.''*

The Union observes that, In *Mid-West Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980), the Board determined that an employer's comments that all unions did was ''sit on their butts and collect dues'' was not violative of the Act, because the remarks were made in the absence of any threats. Similarly, in *Hearst Corp*., 281 NLRB 764 fn. 3 (1986), an employer's comment that there was no need for unions was not violative, since it was unaccompanied by threats of reprisal. Here it argues there were threats.

Safety expert James Thorn credibly testified, based upon his extensive qualifications in construction safety and health fields in general, and bases on his knowledge of Brown & Root's practices in particular, that Rhone-Poulenc produces highly toxic chemicals that could leak at any time (Tr. 4678). As a result, every person at the plant must be able to wear safely any respirator at all times (Tr. 4707). Thus, all personnel must comply with the facial hair policy as written, without exception. In addition, several other employees testified that their understanding of the scope and importance of the facial hair policy was as Thorn testified.

The Union nonetheless contends Brown & Root discriminatorily enforced its shaving policy against Lucas because there were a number of other employees who had mustaches longer than Lucas who were not forced to go home and shave. There were a number of employees who had violated Brown & Root's written facial hair rule who were not sent home to shave or otherwise disciplined (Tr. 584). In fact, at least two employees who were in violation of the facial hair policy were not sent home to shave or disciplined in any other way (Tr. 805–810). On the very day Lucas was sent home, there were employees with mustaches longer than Lucas on the jobsite. But those events did not involve Thorn.

The Union urges as in support of its position, the testimony of Coon, who was Lucas' direct foreman at the time. Coon testified he did not believe Lucas was in violation of the facial hair rule; and, Lucas' facial hair did not interfere with the air mask they were provided on the job (Tr. 976–978). But Lucas had no quarrel with application of the rule to his beard. The issue is about the mustache.

According to Lucas, Thorn and Fitzgerald had seen Lucas virtually every day, when his mustache was in the same condition, yet neither had said anything to Lucas before the day he was sent home (Tr. 438–439). Other employees were allowed to continue to work in violation of the facial hair rule if they shaved before they came back to work the next day. Supervisors had even violated the policy for several days and were not sent home to shave (Tr. 927–928). Safety Supervisor Thorn himself violated the rule (Tr. 4752).

Brown & Root's chief warehouseman testified that weekly safety meetings were held because it was common for employees to deviate from the facial hair policy. Cowart essentially confirmed that Brown & Root conducted weekly safety meetings to remind employees of rules from which they sometimes deviated; and he confirmed the facial hair rule was among the rules discussed at these weekly meetings (Tr. 2277). Employer contends this does not show lax enforcement of the policy, but rather proves Employer's concern that employees abide by this company rule. The Union argues, the Employer's discriminatory enforcement of the rule coupled with its failure to provide any proof it would have enforced the rules in the same way in the absence of Lucas' union activities leads to the inescapable conclusion this was yet another way for the Employer to restrain and interfere with Lucas' protected activity.

After Lucas left the jobsite he had photographs taken of his mustache both before and after he trimmed it (Tr. 437–438). Lucas left work at approximately 9:30 in the morning; and he did not return to work that day at all. (Lucas' normal work day was 7 a.m. to 5:30 p.m.) On redirect, Lucas explained why he did not return to work on the day he had to leave work to go home to shave on instructions from management. He testified that he had carburetor problems with his car and was unable to get back into work. He did call the Employer to notify them that he would not be returning to work. Nothing was said to him the next day concerning this except for Oscar Cole who remarked, ''By the looks of your car I believe that it broke down'' (Tr. 579).

After leaving the worksite the prior day, however, Lucas had first gone to Thomas' office and had some pictures taken of his mustache to show that it was not very long. As to the reason he went to the Building Trades Council rather than going straight home to shave, he states that *he was mad and he wanted to get his picture taken so he would have some recourse and proof of how he looked the day they sent him home to shave* (Tr. 597).

Lucas has relatedly identified several photos taken of his face before and after Lucas trimmed his mustache as Employer required. These pictures are in evidence as General Counsel's Exhibits 15 and 16. (Photo marked G.C. Exh. 15 was taken on March 14, 1990, before Lucas trimmed his mustache. Photo (G.C. Exh. 16) was taken 1 day after he had trimmed his mustache). Contrary to Employer's urging, I conclude any find there is virtually no difference visible in the pictures. Employer otherwise does not appear to contest the generation of the pictures for such comparison, but even if it does, I credit Lucas testimony on origin and reason for these pictures. Whether standard is met or exceeded is closer question.

Lucas has also testified that, in general, he had never heard of any other employee being required to shave at work, or of being sent home to trim their mustache. Lucas assertion that prior to March 14 when he was sent home, both Thorn and Fitzgerald had seen the condition his mustache was in virtually every day; and, although his mustache was in the same condition earlier, as it was on the day they required him to shave, they never made any reference to it prior to March 14 (Tr. 438–439) was erroneous as to observation, not correction of being required to go home. Lucas testified at least two employees, Mike Elliot and Nicky Moles, had mustaches that were longer than his (Tr. 440). He further testified that Respondent's rule on facial hair as written and as in evidence as Respondent's Exhibit 2 was not applied the way it was written (Tr. 584). Lucas explained what he meant by this, he felt there were quite a few people that had mustaches below their lips and shaved when they wanted to shave, while others were asked to shave at different times

and he was sent home to shave (Tr. 584). Lucas complains of perceived disparate enforcement of the rule against him.

Lewis has testified that on the same day that Tom Lucas was sent home to trim his mustache, another employee named Joe Johnson was asked to go home to trim his beard and mustache or given the option of ''dry shaving'' out on the job. Management representatives asked Johnson if he would go home and shave and when Johnson told them ''no,'' they asked him to get up and leave, but he did not leave the job (Tr. 805). They had asked Joe Johnson to shave at 12 noon. Lewis witnessed Johnson leaving, and then Johnson came back after a few minutes and went on to work with Lewis. By then it was 12:15 p.m. (Tr.805–806). Lewis testified Johnson's beard was in the same condition that it had been before he was asked to shave, so Lewis presumed he did not shave in the interim. Lewis observed Johnson at work the remainder of the day.

Lewis further testified that same day, Fitzgerald asked Lewis to shave. Lewis told Fitzgerald that he did not have any reason to shave; he did not have enough beard, just a 5 o'clock shadow. Lewis also asserts that he explained to Fitzgerald he was not going to wear a respirator that day, so he did not need to shave. *Lewis recalled that Fitzgerald told him that there was a safety audit going on, and Safety Director James Thorn would send him home or make him ''dry shave'' if he caught him*. Lewis still did not shave, nor did Foreman Fitzgerald discipline him in any way for refusing to go home and shave (Tr. 806–807).

Lewis related further, he then saw Fitzgerald go on to another employee named Denver and tell him he needed to go home and shave, although Denver did not shave either. Lewis remembered seeing Denver later that day and his facial beard had not changed (Tr. 807–808). Lewis has corroborated Lucas, in testifying Foreman Nicky Boyle had a 2-day beard with mustache down in his mouth, worse than anybody else in the project. According to Lewis, as far as he knew, he (Foreman Boyle) was never asked to go home and shave. Lewis has testified explicitly Foreman Boyle's mustache reached down below the lips. It was a long mustache down to about the bottom of his chin (Tr. 808).

As to the Employer's facial hair policy (enforcement), Lewis testified it was generally inconsistently applied. If you let your beard go for 2 or 3 days, nobody ever said nothing, and then one day out of the blue, they would say, well shave. Fitzgerald would look at you and say, well you need to shave today. Lewis testified, ''So its kind of casual until they wanted to enforce it.'' He went on to explain, the rule was ''casual.'' Foremen there had not shaved in 2 days (Tr. 856). Lewis testified that it was rare that anyone else besides Lucas was sent home to shave. The standard pattern was that if someone had a 2 days' growth of beard or something like that, they were told ''You need to shave tonight before you come back into work tomorrow'' (Tr. 860).

At the time of the shaving incident involving Lucas, Lucas was on Coon's crew. Coon corroborated Lucas and Lewis that, in his opinion, Lucas' beard did not appear to need shaving on the day of the incident. Coon also testified that as a supervisor, he had reported employees to his superiors because he thought they needed shaving, and he would write them up for it also. Coon has affirmed he did not report Lucas to Fitzgerald on the day that Lucas was required to go home to shave. Coon testified that in his view as a supervisor and his view of the application of the shaving rule, Lucas did not need to shave that day. Coon also confirmed that Lucas' mustache did not go below the corners of his mouth that day. Coon testified that Lucas' mustache and beard did not interfere in any fashion with the use of an air mask (Tr. 977–978); and, finally, Coon also corroborated that there were other employees and other crews (with employees) with mustaches longer than Tom Lucas' mustache (Tr. 980); and, there were employees with the same amount of facial beard hair as Tom Lucas, on his crew, on the day that Lucas was sent home to shave, who were not required to shave (Tr. 981). There is no evidence that Thorn saw those who assertedly had longer mustache that day.

Employer cross-contends, rather than discrediting Thorn, Coon's testimony has undermined his own credibility. At that time, Coon was still a supervisor (Tr. 987), and was responsible for enforcing the policy. His failure to do so, combined with Thorn's physical inability to monitor every employee every day and Coon's bias against the Company, require this testimony be discredited. I do not agree. In this instance however, there is substantial evidence that corroborates Coon's account.

With regard, to Coon, it is Employer's basic contention, that Coon is an admitted liar and a perjurer who changed his sworn testimony after he was demoted from supervisor to rank-and-file employee in a workforce reduction (Tr. 987); and, after his demotion, Coon's attitude toward Brown & Root generally, and toward Lucas in particular, changed. In that regard Supervisor Berry testified Coon had problems accepting his demotion and began finding fault with everything (Tr. 2872). Before he was demoted, Coon did not like Lucas—he had even described Lucas to Berry as a ''god damn mother fucking organizer'' (Tr. 2839–2840).

On other occasion Employer argues Coon's attitude was colored by his father's employment relationship with Brown & Root, in that his father was laid off in November 1990 (Tr. 1083(34)). Coon began wearing a union organizing badge a few days after his father was laid off (Tr. 1083(36)). (Coon's father filed an age discrimination claim against Brown & Root with the West Virginia Human Relations Commission (Tr. 1083(35)).)

In regard to Lucas assertion that other employees were not disciplined and sent out of the plant for facial policy violations, employer contends this simply is not true. Thorn testified he sent several employees out of the plant to shave, both before and after March 1990. These included Chris Baer (October 1989), Paul Mason (late 1989), Dana Jones and Paul Mason (spring 1990), and Todd Armstead (March 1990) (Tr. 4695–4699). (Armstead was issued formal warning notice when he was not clean shaven three times in a 2-week period in early 1990 (Tr. 4699–4700; R. Exh. 188). Employer contends testimony of Supervisor Nicky Moye and employee Lewis that they did not know of employees who were required to leave the plant to shave, establishes nothing. The mere fact that these two individuals did not witness or hear about such events does not prove their nonoccurrence. In that regard, I agree.

Employees Wayne Jones and Dana Mikeal testified that Thorn had given them the option of shaving at the plant or off the premises (Tr. 2694–2695, 3231–3233). Mikeal testified that on one occasion when Thorn told him to shave, he also told Ted Alift to shave either on or off the premises (Tr.

3232). Moye also testified that as a supervisor, he had enforced the policy against several employees, including Mikeal and Alift (Tr. 1901–1902); and Fitzgerald enforced the policy against Supervisor Nicky Moye when his mustache was too long (Tr. 1903–1904, 3159).

Lucas has testified that up to the time that he was required to shave his mustache and beard, he had not had to wear a respirator that would have to fit over a beard. But, sometime after that time, he began wearing respirators (Tr. 439). Regarding facial hair policy, *Lewis* has testified the respirator fit over his mustache but, for some reason, they would not provide Lewis with respirator glasses; so the respirator would not seal for him because he had to wear glasses. Lewis stated he had advised both Safety Director James Thorn and his assistant he needed respirator glasses; and Lewis asserts, they refused to provide them to him (Tr. 809).

Respondent would have it observed that following this conversation, Brown & Root purchased the respirator Lucas had recommended. It urges this shows Brown & Root took Lucas seriously and evaluated him and his recommendations objectively—conduct inconsistent with Lucas' general claim that the Company was intent on beating him down because he was an organizer (Tr. 539–540, 4706). Indeed Lucas has reveasled that at the time of review of MSDS, *Thorn was suggesting to him that he might use a fresh air mask when he worked on paint.*

Finally, Employer argues Lucas was not sent home for the day but merely exercised the same option given to all other Brown & Root personnel when in violation of the policy, namely to trim his mustache outside the plant (Tr. 4706–4710; R. Br. 152–158). While Brown & Root supervisors may not have identified each and every employee on each and every occasion of facial policy noncompliance, the evidence in no way establishes discriminatory enforcement based on union activity.

The facts are fully set forth above. This is a close call. My view is that the fact that Thorn did not direct Lucas to perform both facial policy requirements at once, coupled with the picture comparison, renders the matter suspicious. But the fact is that the leading union adherent came in on an MSDS safety matter, with a shadow beard that even he does not contest. While the credited grinning gives me pause, there is no evidence that at this time, Lucas or other employees were using safety rules to attempt to harass the Company, with supervisors recognizing it and seeing the irony of a situation that might be the account of the grin here. But the only evidence of that occurs months later. If I have reservation in the matter it is on Thorn advising he had something to talk to Lucas on. Here, the evidence is more persuasive of a safety supervisor, first suggesting safety approaches to a problem, and then addressing an acknowledged beard problem. Thorns statement to Lucas as the chairman of the organizing committee about the future of unions, to me was expression of viewpoint, not threat. The fact is Lucas elected not to return. I shall recommend that this complaint allegation be dismissed.

10. Employer literature of March 28, 1990

The General Counsel contends General Counsel's Exhibit 17 is an antiunion statement that the Respondent handed out to employees with their paychecks on March 28, 1990. Lucas testified it was handed out to employees (also addressed individually by name) with their paychecks on March 28, 1990. General Counsel's Exhibit 17 says:

> I have received an official letter from the Chemical Valley District Council of Carpenters which represents one of the unions (Local 1207) listed on the ''Authorization for Representation'' cards which you are being solicited to sign. We have also noted written claims which have been distributed to you about our safety and stating that the unions ''don't want *your money.*''
>
> In the area of safety, we have repeatedly shown that our statistics are over 50% less than other heavy construction firms when comparing rates per man-hour for (1) recordable injuries, (2) lost time accidents and (3) deaths. However, statistics aren't the real answer, we are concerned when any employee receives an injury. For example when a death occurs, we become personally involved with the employee's family through our Employee Assistance Program which was started 10 years ago in 1980.
>
> Some literature recently distributed by the organizers refers to two Brown & Root employees who succumbed to Argon gas in 1974. With this reference to two tragic and untimely deaths, they infer (as they have done with the recent MIC gas exposure) that the incident was caused by improper Brown and Root safety procedures. They fail to point out that outside investigators of the 1974 incident determined that the two men (and a third who survived) were in an unauthorized vessel, not working, but smoking marijuana when they were exposed to the ARGON.
>
> When the organizers claim they ''don't want your money'' and emphasize that local members set their ''dues,'' you might ask them questions about who ''sets'' their other many financial obligations. For example, almost all sixteen of the unions authorize increases to their national monthly per capita ''tax'' by the unions' National Executive Board ''without requiring a vote of the Local union'' (see Carpenters Constitution, page 50). Incidentally, the Carpenters General Executive Board in 1988 was made up of 16 people who received salary and expenses of almost $2 million dollars, or an average of $121,823 per member.
>
> Also, when they tell you about their low monthly ''local'' dues, they tend to not mention their ''local'' assessments. You might ask the local Boilermakers about their $51,575 in assessments in 1989, or you could question the carpenters about their $103,074 in local assessments in 1989.
>
> As I stated in my March 7 memo to you, I suggest you bring your open questions to us and hear our side before you take action which could make you subject to lifetime financial and regulative restrictions.

11. The smoke area incident on March 29, 1990

The complaint, paragraph 6(c), alleges that on or about March 29, 1990, Respondent harassed its employee Lucas by prohibiting him from talking to other employees at Respondent's jobsite.

The General Counsel relies on Lucas' testimony that on March 29, 1990, he was in the smoke area (smoke shack) on break with Brown & Root employee Jack Noble. (Rhone-

Poulenc prohibits smoking on company property except in designated areas referred to as ''smoke shacks.'' These are small buildings, approximately 6- to 8-feet wide by 15- to 20-feet long.) There are three benches in the smoke shack, the benches are about 5-feet long. Three to four people sit on the bench in the smoke shack (Tr. 909–910).

Noble is a toolroom clerk, who worked for Chief Warehouseman Gary Wright, (then) a Brown & Root supervisor in charge (materially) of the toolroom. As chief warehouseman, Wright, was (then) responsible for receiving all materials on the jobsite, issuing materials, and keeping track of all the tools. He supervised five employees, including Noble. Noble's responsibility was to issue tools in the morning and all day long, and collect tools every afternoon. Ruth Knabb, who was called by the General Counsel as a witness was also present. Knabb is an employee of Rhone-Poulenc, and a member of the IAM.

Lucas' recollection is that Noble had an authorization card in his hand; they were talking about the Union; Lucas was wanting Noble to sign the card. (Tr. 597–598) and Noble was asking what area of the card he should check for what trade he would enter. (Knabb, called for corroboration, while confirming Lucas-Noble conversation recalled that she noticed some employees of Brown & Root asking Lucas about campaign letters they had received from Employer, that said that unions would only hurt them (Tr. 896–897). Knabb's recollection would be consistent with company literature distributed the day before.)

Lucas continues that as they were thus talking, toolroom foreman (chief warehouseman) Gary Wright came up and said, ''Hey Jack, come with me.'' Lucas turned to Knabb, and Lucas said, ''Now you see what happens.'' Knabb responded, ''Yes I see that.'' (But Knabb recalls Wright was standing outside smoking when she went into the smoke shack, and that 5 or 6 minutes later, he leaned in the window and said something to Noble, which Knabb could not hear, but which caused Noble to follow him out of the smoke shack and leave the smoke shack, abandoning his conversation with Lucas.

But, Knabb's further recollection was another employee then slid down on the bench where Noble had been, and was asking Lucas about the letter and about union assessments. Knabb recalls Lucas had the Union's constitution and bylaws open and Lucas was explaining about assessments (Tr. 899–900). Knabb then recounts another foreman came up and called this employee outside, saying, ''I need you outside'' (Tr. 900–901). Knabb thought this was unusual since all of these employees were on their lunch hour. Knabb's account is that as Knabb left the smoke shack shortly thereafter, Lucas looked at her, shrugged his shoulders and said, ''This happens every time these people talk to me.''

Lucas relates Noble never came back to sign the authorization card that day (Tr. 598). Indeed, it was not until September 29, 1990, that employee Jack Noble finally signed an authorization card for the Union (Tr. 598–599).

Wright, who was not employed by Employer at time of hearing, testified that on about March 29, during his lunchbreak, another supervisor asked him whether a particular tool was available. Wright told him that he thought it was and would check on it. Wright went to the smoke shack to find Noble and ask him about the tool. Noble was standing outside with 15 to 20 other people). Wright explained, even in this mass of employees, Noble was easy to spot because he always wore an army jacket and he was a ''cotton top'' or ''white blond.'' Wright's version is Lucas was standing 3 to 4 feet to Noble's left and walked away as Wright approached (Tr. 2220–2222). In any event, Wright walked to an area outside the smoke shack and asked toolroom clerk Noble to check on the whereabouts of a certain tool right after lunch; Noble replied that he would, and Wright left (Tr. 2217–2220). Employer contends while Wright, during the normal course of his business, may have stumbled upon Lucas and Noble discussing the union, it is not illegal for a supervisor to ask an employee a work-related question while he is at the plant.

The Union urges in regard to paragraph 6(c) allegation that the above evidence shows Respondent harassed and isolated Lucas on March 29, 1990, by prohibiting him from talking to other employees at Respondent's jobsite. Employer contends that its supervisor Gary Wright did not harass Lucas when Wright had asked his assistant a work-related question at the smoke shack. The General Counsel and Charging party fail to acknowledge either the differing versions of this incident recounted by their own witnesses, or the logical, contrary evidence establishing that no harassment, much less harassment because of Lucas' union activities, ever took place.

It is Employer's contention that the General Counsel and the Union offered only inconsistent testimony of two biased witnesses in support of this charge. Lucas testified that Wright opened the smoke shack door; Knabb testified that Wright did not come in the door, rather he leaned in the smoke shack window (Tr. 441, 616, 911). Lucas said he was holding authorization cards in his hands; Knabb said they were discussing a company campaign leaflet, and Lucas had the Union's constitution and bylaws discussing the subject of assessments (Tr. 441, 911). Notably, neither of them testified that Wright had any knowledge at all of the alleged conversation between Noble and Lucas, and neither the Union nor the General Counsel produced Noble, as Employer argues would have been done if his testimony would corroborate Lucas.

Employer's basic argument is, even though accounts vary, neither witness controverted one basic fact—Wright went to the smoke shack to ask Noble a work-related question (Tr. 2219). Employer argues although the timing may have been inconvenient for Lucas, it is not a violation of the Act. *Carter Hawley Hale Stores*, 267 NLRB 385, 400 (1983) (ordinary practices by management which place them in areas where organizing activities are being conducted are not violations of the Act). It is Employer's basic position that Wright simply asked Noble if he knew where a certain tool was. There was more to it, but not enough for violation. I shall recommend this complaint allegation be dismissed.

I do, however, note the confirmation in Knabb's credited testimony further supportive of earlier findings made. Thus, Knapp confirmed there was tension between Thorn and her and other Rhone-Poulenc employees. Knabb described a certain amount of controversy or tension existed between the Brown & Root employees and the Rhone-Poulenc employees. According to Knabb, Thorn would make comments to Rhone-Poulenc employees that Brown & Root was going to take over the maintenance program at the plant and Thorn referred to Rhone-Poulenc employees as stupid, ignorant hill-

billies. Knabb related there was verbal abuse from other Brown & Root employees also. Indeed, Knabb testified that she complained about it, and she complained about harassment from Thorn, to Project Manager Jesse (Cowart). She also had heard rumors that IAM was considering organizing Brown & Root.

Knabb explained why Brown & Root's coming into the Rhone-Poulenc plant to work was very controversial to Rhone-Poulenc employees. First, she testified that *Rhone-Poulenc employees had been told by their management that Brown & Root was not coming in. This was back in May or June 1989*. Then they heard rumors of Brown & Root's working record, and it became controversial, largely because people like Thorn made statements that they would come in to take over the maintenance program of a plant. She stated that *Rhone-Poulenc employees felt that Brown & Root was a threat to their jobs*. She explained further that they felt their jobs were in jeopardy because of the history of what Brown & Root did in going into plants, working for less wages, and taking over the maintenance jobs. She also noticed Rhone-Poulenc had not been replacing people that retired, which they had done in the past. She stated, in her opinion, Thorn was a smart aleck type of person; and, she had heard from Jesse Cowart and Wimberly, supervisors, that Brown & Root would like to send him back to Texas (Tr. 918–920).

12. Alleged Fitzgerald layoff threats

a. *The alleged April 12, 1990 threat of layoff*

The next two complaint allegations are conveniently dicussed together. Complaint paragraph 5(b)(iii) alleges that Respondent acting through its Foreman Fitzgerald, on or about April 12, 1990, at a jobsite in Institute, West Virginia, threatened to lay off an employee because of his activities on behalf of the Boilermakers.

There was a safety meeting on April 12, 1990, at the print shack. Towards the conclusion of the safety meeting, which on this occasion was conducted by Foreman Fitzgerald, Lucas recounts that another employee named Wayne Jones nudged Lucas and said, ''Ask Tommy when the next layoff is going to be.'' After the safety meeting ended, when Fitzgerald asked if there were any questions, Lucas said, ''Yes sir, I would like to know when the next layoff is going to be.'' Lucas testified Fitzgerald responded, *''I don't know, but you are going to be on it.''* (Tr. 444.) Irrespective of whether the Company ever followed through on its threat, the Union argues that this conduct undoubtedly interfered with Lucas' rights to engage in protected activity on behalf of the Union; and, the Company has again violated Section 8(a)(1).

Employer counters neither the General Counsel nor the Charging Party produced any corroboration of this remark, despite the fact that many others allegedly were present at this meeting to hear it, nor did either provide any accounting of credible, contradictory testimony establishing that no threat ever occurred. Employer would rely on the credible denial of Fitzgerald, corroborated by Jones. Thus Jones testified he never told Lucas to ask about layoffs, or the next layoff, nor did he ever hear Lucas ask about layoffs (Tr. 2679, 2690, 2707). Fitzgerald testified that after a meeting, Lucas had asked him when the next layoff would be and Fitzgerald said he did not know, but we would let them know, or, we will let you all know; but he never said Lucas would be on it (Tr. 2750, 2781). Jones testified that he was sure he had never asked Lucas to ask about the next layoff, because ''[i]f I wanted to know about a layoff, I would have asked myself'' (Tr. 2707). More to the point, Jones has testified that he attended all four of the safety meetings in April 1990 and did not remember any statement by Fitzgerald that Lucas would be on the next layoff (Tr. 2679).

Employer observes despite the fact that two pipe crews were at the safety meeting, the General Counsel failed to present anyone to corroborate Lucas' version of the events. In contrast, Respondent Employer has presented two witnesses who specifically refuted Lucas' allegation and one other, Nickey Moye, who testified that he did not recall hearing any such statement by Fitzgerald at a safety meeting (Tr. 1905–1906). The argument made is that by offering only unsubstantiated testimony of an employee with a clear anticompany bias, the General Counsel has clearly failed to sustain its burden. I agree. In this matter I credit Fitzgerald, corroborated as he is, and Lucas not. I need not reach Employer's alternative argument, even if Lucas' story was accurate, the fact that everyone, including Lucas, chuckled at Fitzgerald's retort (Tr. 594) shows that it was nothing more than a joke, and not violative of the Act.

b. *Fitzgerald's alleged statement on ''union politics''*

The complaint paragraph 5(b)(iv) alleges that Respondent Employer acting through its Foreman Fitzgerald, on or about April 12, 1990, at a jobsite in Institute, West Virginia, informed employees that another employee had not been laid off because of ''union politics.''

Lewis was laid off on April 15, 1990. According to Lewis, about 3 p.m. that day, he was informed, along with another employee nicknamed ''Wormie,'' that they were being laid off. When Wormie asked why they were being laid off, Fitzgerald said, ''There is a computer in Texas that kicked our name out based on bad absences, late arrivals and missed days.'' (Tr. 803). Wormie then argued that Tom Lucas had a worse absenteeism record than he did, or that Lucas' absenteeism was just as bad or worse than his, and Fitzgerald said, ''[T]hat's union politics'' (Tr. 803). Lewis recounts Fitzgerald replied, *''That's union politics.''* Lewis recalled that Nicky Boyle, another foreman, was standing right there and that he was kind of laughing with Fitzgerald about his comment about ''union politics'' and that that was the reason they could not lay Lucas off (Tr. 803). Specifically, Lewis recalls Fitzgerald saying, ''This was union politics and they could not lay Lucas off'' (Tr. 803).

Both Sanson and Fitzgerald specifically denied that Fitzgerald said Sanson was laid off instead of Lucas because of ''union politics'' (Tr. 2757, 3272). Both testified that Sanson asked Fitzgerald why Sanson was being laid off and Fitzgerald said it was because of his absenteeism (Tr. 2731, 2782, 3271–3272, 3278–3279). (Fitzgerald testified that Oscar Cole selected Sanson for layoff based on his absenteeism rate (Tr. 2782).) Cole confirmed that Sanson's attendance problem was worse than Lucas' (Tr. 3487). No one else was present during this conversation (Tr. 3279). (Lewis alleged that Nicky Moye, another pipe crew foreman, was standing there at the time, laughing and joking with Fitzgerald and that he also conveyed, presumably through his actions, that the decision was political (Tr. 803). No other testimony, however,

places Moye in the vicinity of any conversation which remotely resembles Lewis' rendition of events.)

Both Sanson and Fitzgerald testified that it was Lucas (who walked up after the conversation between Fitzgerald and Sanson), *not Sanson*, who asked Fitzgerald why he had not been laid off instead of Sanson (Tr. 2731–2733). Sanson testified (Tr. 3273):

> Q. What did Mr. Lucas say?
>
> A. Nicky [Moye] had told me that I got laid off so, I went and gathered my tools up and Lucas asked me what happened and I told him that I got laid off and he said—so, I was getting ready to load my tools up and Tommie [Fitzgerald] was standing there and he (Lucas) said, why don't you lay me off instead of Wormy [Sanson] and Tommie said, can't do it.
>
> Q. Did Tommie Fitzgerald say anything else after that?
>
> A. No ma'am.

Sanson further testified that when Lucas had this exchange with Fitzgerald, they were standing beside a pickup truck and Lewis was not present (Tr. 2733).

Lewis' uncorroborated rendition of this conversation is clearly at odds with the consistent testimony of the two people alleged to have had the conversation. Both recall a totally different discourse. ''Wormy'' Sanson and Fitzgerald each testified, consistent with each other, that Sanson asked why he was laid off, and Fitzgerald responded that it was because of his absenteeism (Tr. 2731, 2771–2772, 3278–3279, 3487); and both testified mutually consistently that ''union politics'' was never mentioned (Tr. 2757, 3272). Following this conversation, Lucas, not Lewis, asked Fitzgerald why he could not be laid off instead of Sanson, and Fitzgerald replied only that the decision had already been made (Tr. 2731–2733).

This is another instance where Lewis recollection appears unsubstantiated by anyone. I have earlier found difficulty in crediting Lewis in such circumstances. In contrast Fitzgerald is substantially corroborated. I shall recommend that this complaint allegation also be dismissed.

13. The alleged Johnson interrogation of Long on April 19, 1990

Complaint paragraph 5(c) alleges that on or about April 19, 1990, Brown & Root's personnel manager Johnson, coercively interrogated applicant Ed Long about his union membership.

Long testified that on April 19, 1990, after his meeting with a Job Service employee, he had filled out a Brown & Root employment application. Under heading ''Work Preferences'' on first page of the application, Long listed ''22 years L-1207.'' Long went to Johnson's office, introduced himself and gave Johnson the application. Johnson looked at the application for 2 or 3 minutes . According to Long, Johnson asked him if he belonged to a union. Long said, ''[Y]es.'' Johnson asked which one and Long replied, ''Carpenter's Local 1207'' (Tr. 940–941). Johnson then said he would be in touch if Long was needed (Tr. 930–931, 934, 939, 941).

Employer defends first that Johnson did not interrogate applicant Ed Long about union membership. The Employer secondly argues this charge should be dismissed as a matter of law because Long volunteered information about his union affiliation on his employment application, thus precluding the urged finding of unlawful interrogation. *Operating Engineers Local 948*, 238 NLRB 1113 (1978), enfg. *Osteopathic Hosp. Founders Assn. v. NLRB*, 618 F.2d 633 (10th Cir. 1980). I disagree as to the latter as the union reference was somewhat ambiguous, or unclear. In contrast Johnson testified that he did not ask any applicants if they were union members (Tr. 5024). And, he certainly did not ask applicants who wrote ''voluntary union organizer'' on their applications about union membership (Tr. 5009–5010). In urging credit of Johnson, Employer contends severally, Long's testimony is inconsistent, illogical, and patently unreliable. The matter need not be belabored, I do not believe that at this late date Johnson would have made such an inquiry. I credit Johnson's denial; and, I need not reach Employer's other arguments. I shall recommend this complaint allegation be dismissed.

14. Renewed union activity in the fall of 1990.

Former foreman Coon testified that he became actively involved in the union organizational drive when he signed a union authorization card in October 1990. In November 1990, he started wearing a union button at work and began organizing other employees (Tr. 991–992). The union badge Coon wore is in evidence as Charging Party's Exhibit 3. It is in form a 2.25 x 3.75 inch handmade white card that reads Building and Trades UNION Organizer. Two days after Coon started wearing that badge, he started wearing a second badge, which is in evidence as Charging Party's Exhibit 4 (Tr. 992–993). It is a 3 x 4 handmade white card that similarly reads, Building & Trades Union Organizer. Coon also wore another union badge on the job (Tr. 994) (which is in evidence as C.P. Exh. 5). It is a 2-inch diameter circular button that (in large letters) says UNION YES with a related block checkmarked, and with the seal of West Virginia Federation of Labor, AFL–CIO inscribed within the O of the word UNION. The button (in smaller letters also says), Charleston Building Trades Organizing.

Charging Party's Exhibit 6 is a letter which Coon delivered to his foreman notifying him that he was organizing on behalf of the Union (Tr. 993). This undated letter, signed by Lucas as chairman of the organizing committee, and addressed to Pribyl, states:

> Please be advised that Steve Coon is an organizer for the Building and Trades Organizing committee. His rights are hereby protected under section 7 of the National Labor Relations Act.

Coon handed in the letter announcing that he was a union organizer to Supervisor Bob Berry. Berry's response was ''Oh shit!'' Then Berry gave it to Dennis Gohlke and Gohlke said to Berry, ''Who, Steve?'' Bob Berry said, ''Yes'' and Coon turned around so they could see his union badge (Tr. 995). Gohlke then went towards Paul Pribyl's office with the letter. After Coon gave the letter in, Gohlke, who normally ate lunch with Coon, stopped doing so (Tr. 996).

The Shawnee Park incident

The Union would rely for additional animus on the evidence of a Coon reported incident of contended surveillance of Coon by Supervisor Bob Berry in late November 1990.

The evidentiary circumstances were that Coon had agreed to meet with two employees after work to discuss the Union. They agreed to meet on the side of the road at Shawnee Park, right off Route 25 (Tr. 1016), about a mile East of the plant (Tr. 1022). Coon met the two employee, one a member of the pipe crew, and one a welder. The employees met with Coon to sign authorization cards. The employees stayed in their vehicles.

Coon testified that in his side view mirror he saw Brown & Root rigging Foreman Bob Berry go by real slow in his pickup truck, staring (Tr. 1024; Tr. 1083(80)). (Tr. 1083(1–80) corrects 80 pages to consecutive page numbering.) According to Coon, Berry then drove about a quarter of mile past the entrance, turned around and came back about 5 minutes later and passed by them slowly again, going about 15 miles an hour, looking. Berry came back a third time. Coon could see Berry's face clearly, but not directly in his eyes. After the second passby, Berry again returned a third time going 15 miles an hour about 2 minutes later. The two employees Coon had met with signed union authorization cards that night (Tr 1025–1027). Neither were called to corroborate Coon. The Employer argues for negative inferences about what their testimony would be. I decline. Coon was laid off on January 11, 1991. The complaint does not allege Coon's layoff was discriminatory. The General Counsel does contend these incidents of surveillance show Respondent's antiunion posture.

Employer counters that Supervisor Berry did not drive past Shawnee Park, much less spy on Coon there. At trial, Berry testified categorically that he did not spy on union supporters and specifically did not spy on Coon at Shawnee Park. Berry drives a red and white S-10 Chevrolet with a camper top on the bed; and there were numerous vehicles like his in the Charleston, West Virginia area. Berry testified that he does not drive past Shawnee Park on his way home from work in this (winter) season. Coon admitted he did not get the license number on the truck he claims was Berry's. Coon testified that it was dusk, that there was no light from any commercial establishments, that Berry's truck had its headlights on; that the overhead light inside of Berry's truck was not on; and that the overhead light inside of Coon's truck (which was positioned between Coon and the passing vehicle) was on.

Employer argues Coon's story should be discredited for a number of reasons, sufficient of which (I find) are the described road conditions; and Berrys categorical denial. I find Coon was (at best) mistaken. In light of the above findings, the evidence question underlying Employer's further contention that as a matter that was subject of previous charge investigation, with withdrawal of charge and no complaint issuance, this surveillance incident was rendered essentially incompetent or barred evidence, is itself rendered mute. (While the allegation did not specifically appear in the charge, the issue was investigated by the Region, as contended from being reflected in both the affidavits of Coon and Berry (Tr. 5252–5253); and the entire matter was withdrawn prior to a formal dismissal (R. Exh. 370).)

15. The two complaint amendments

Motion of the General Counsel to amend complaint was granted in two instances. The complaint as so amended thus alleges (1) that, in early March 1990, before Lucas wore a union button (shortly before March 7, 1990), but on date that is otherwise uncertain, Foreman Fitzgerald restricted employees talk about the Union during nonwork time at the jobsite (Tr. 869).

Information was elicited from Lewis upon cross-examination by Respondent's counsel. Respondent's counsel had asked Lewis if he could give some examples of the way in which Supervisor Fitzgerald had displayed his supposedly bad attitude (Tr. 838). In response, Lewis described an incident when he was in the smoke break area along with Tom Lucas and Supervisor Fitzgerald. Lewis relates that they were on their dinner break and Lucas was explaining benefits that a union could give the men. Lewis, in his testimony, recalled Fitzgerald saying, ''*This isn't the sort of thing you are supposed to be talking about during your dinner break. You all have to talk about this outside the project.*''

On redirect examination, Lewis then testified Fitzgerald ''just said that, you know, that we couldn't talk about that [the Union] during the Company's time and in the work place; we needed to talk about that outside the job area.'' Lewis specified that they were on their lunchbreak at the time; they were off worktime also, He estimated the date as shortly before Tom Lucas put on his organizing button, or early March 1990 (Tr. 867–869).

Lewis later testified that Fitzgerald made the statement *after he had told the men it was time to leave the smoke shack and return to work*. As they started walking out the door, he said, ''*You're not supposed to talk about union organization and this and that while you are in here on the job. You need to talk about that outside the job.*'' Lewis, however, clarified that they were not yet back on worktime when he made the statement (Tr. 876). According too Lewis, ''The work time hadn't started because we get in a van and we drive back to our work area and we are there at 12:30. So like at 25 after, we are still on our time going back to our work area'' (Tr. 876).

Employer contends Fitzgerald did not prohibit employees from discussing union matters on the job. Employer asserts the charge based on testimony by Lewis added by the General Counsel by amendment at trial is no more valid than the others he testified to. Lewis and Lucas were sitting with other employees in the smoke shack at the end of their lunchbreak talking about the Union and benefits the Union could provide (Tr. 872–873). Fitzgerald was standing outside the smoke shack door and told them it was the end of their break and time to go (Tr. 875–876). Lewis claims as they were leaving the smoke shack, Fitzgerald told them that they could not talk about the Union and union organizing while on the job—they needed to talk about that outside the job (Tr. 876).

Fitzgerald's testimony is diametrically opposed. Fitzgerald testified that he *never* told Lewis, Lucas or any other employee that they could not talk about the Union (Tr. 2755). Employer observes there is no corroboration of Lewis, not even by Lucas. In light of Fitzgerald's firm denial, and the absence of corroboration of Lewis, and for reasons earlier recounted, I shall recommend that this complaint allegation be dismissed.

The complaint was also amended to allege that on or about March 12, 1990, Thorn interrogated Lucas concerning union bumper stickers in his possession. On March 12, 1990, prior to Lucas' reassignment to the iron crew, while he was still

in the pipeyard, Safety Supervisor Thorn walked up to Lucas who had been identified to Employer as the chairman of the Union's organizing committee on March 7, 1990, Thorn asked Lucas if he had any boilermaker stickers in his possession (Tr. 422–423). The Union contends relatedly that interrogating employees may also constitute illegal conduct in violation of Section 8(a)(1) of the Act. *Jakel Motors*, 288 NLRB 730 (1988). Interrogating questions regarding an employee wearing union buttons is illegal coercive activity, especially when it is coupled with other threatening or intimidating conduct, such as questions about whether employees plan to vote for the Union. 288 NLRB at 734. The Union contends, similar to *Jackel*, the Employer's questioning of Lucas here about union bumper stickers occurred in conjunction with other threats and isolation. As such, it urges the interrogation violated Section 8(a)(1) of the Act.

Employer contends that the amendment to complaint that Safety Supervisor Thorn interrogate a known union organizer by asking for union stickers was improvidently allowed; and, on the merits is without merit, as Thorn did not interrogate a known union organizer by asking for union stickers. The parties stipulated that the issue of whether Thorn unlawfully interrogated Lucas about stickers was a matter that was investigated by the Region as reflected in affidavits of Thorn and Lucas given in conjunction with this case. As this case is open, however, and the incident arose out of this case, and the General Counsel elected to pursue it on evidence developed at trial, the Employer's argument that the General Counsel's amendment is untimely, appears to be without merit. There was no dismissal (or even withdrawal) of an explicitly charged allegation here. It would appear *Ducane Heating Corp*., 273 NLRB 1389, 1390, 1391 (1985), enfd. without opinion 785 F.2d 304 (4th Cir. 1986); and *District Lodge 64 v. NLRB*, 949 F.2d 441, 445 (D.C. Cir. 1991), are distinguishable.

Employer accedes it is undisputed that on or about March 12, 1990, Thorn asked Lucas if he could have some Boilermakers stickers for his sticker collection. Lucas told Thorn he had some stickers and he would give them to him after work (Tr. 422–423, 4716). Lucas never gave Thorn any stickers (Tr. 513), and the subject never came up again (Tr. 4719). Thorn did not followed up on his request because a maintenance employee gave him some stickers later that day, including the one he had asked Lucas about (Tr. 4717–4718).

To extent Lucas has asserted that Thorn's sticker collection was limited to stickers from union campaigns that he'd been on where Brown & Root had stopped the union campaign, it is not credited. Thorn (I find) has testified credibly, this is the only Brown & Root job he has ever worked on that had an ongoing union campaign. Thorn also testified, his sticker collection is made up of logos, safety symbols, and insignia from various businesses and organizations all over the world (Tr. 4715).

Employer, it seems to me, also has the better part of the argument that Thorn's request was a friendly request for a Boilermakers sticker from the already identified chairman of the Union's organizing committee, and was not coercive. To constitute unlawful interogation there must be some interference with the organizational drive that will reasonably coerce the employee activist under Board precedent.

The stickers here in use were already being publicized. I do not see calculated inquiry, or some probe to solicit response which will reveal an employee's knowledge of union activities in other area, *United Artists Theatre Circuit, Inc*., 277 NLRB 115, 123 (1985). Either the words themselves, or the context in which they are used, must suggest an element of coercion. *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1267 (7th Cir. 1980). It will be recommended that this complaint llegation also be dismissed.

Part IV. Ralph Southall

Southall Applied for Work with Brown & Root at Rhone-Poulenc Jobsite; Brown & Root Hired Southall for the Dupont Jobsite, Subject to Southall Passing Welding Test and Physical Examination

1. Application date April 17, 1990; hire offer September 10, 1990

The General Counsel and Employer agree that most of the facts with regard to Southall's complaint allegation are not in dispute. Charging Party Boilermakers International essentially took no part in the presentment of the Ralph Southall discrimination allegation added by consolidation of Case 9–CA–27674 that was filed by Charging Party 2, WVA Building & Trades Council.

First, Southall originally applied for a job with Brown & Root as a pipefitter welder on April 17, 1990. He wrote ''pipefitter volunteer organizer'' on his application, and he told Johnson that he had previously worked on a project at a DuPont chemical facility (Tr. 655–656, 684; G.C. Exh. 18; R. Exh. 224). (R. Exh. 224 is the same Brown & Root employment application Southall filled out as the one in evidence as General Counsel's Exhibit 18, except that Respondent's Exhibit 224 contains Johnson's written notes made while talking with Southall. In most matters Johnson impressed me as a generally reliable witness. Accordingly, I credit Johnson that his notes are a contemporaneous record Johnson made of his contacts with Southall at each step of Southall's hiring process; and, they are given normal business record credit where Southall's recollection on dates differs, and I find faltered (Tr. 5043–5044).) Johnson's notes on Southall's application reflect Johnson first spoke with Southall on August 23, 1990; next on September 10, 1990 (to set up welding test for the next day); and on September 11, 1990 (after Southall had failed to show up for his welding test) to reschedule a test for September 18, 1990. These, however, are not all the conversations Southall and Johnson had.

In August 1990 (essentially 6 months after Southall had file application), Edward White, Brown & Root's project manager at DuPont, contacted Johnson and advised that he would probably need a welder soon for the project. When it considered applicants for the DuPont project, Brown & Root preferred candidates with DuPont experience who were familiar with that company's specialized safety and construction procedures. (DuPont favored personnel who had knowledge of their specialized procedures; and, Brown & Root had represented to DuPont it would try to hire a large number of construction workers with DuPont experience for the project.) Approximately 30 percent of Brown & Root's initial rank-and-file employees hired at the DuPont site had prior DuPont experience. Because Southall also had some prior DuPont experience, Johnson contacted Southall who con-

firmed that he was still interested and wished to be considered if a welding position opened up. (Again, Johnson was not impervious to calling over 90-day applicants, to determine if they were available to fill prospective needs.)

About 2 weeks' later, Johnson spoke with Project Manager White and told him about Southall's DuPont experience. White told Johnson to hire Southall and to arrange for a welding test. Johnson contacted Southall on September 10, 1990, and formally offered him a welding job, subject to his satisfactorily passing a physical exam and a welding test which was scheduled for September 11 at 7 a.m.. When Southall failed to appear for the test, Johnson attempted, without initial success, to contact Southall at home. Later that morning, Johnson reached Southall, Southall informed Johnson, that he was ill that day, and requested that Johnson reschedule the test, which Johnson did. Southall passed the welding test on September 18. Following the test, Southall met with Johnson and they completed all the forms necessary for Southall to go to work for Brown & Root, including a medical insurance election form, a drug test authorization form, a Brown & Root assignment authority, and an I-9 employment eligibility form. Southall passed the mandatory drug test, and the physical examination was scheduled for the next day (Tr. 657–658, 662, 692–698, 701–704, 2352–2353, 2358–2359, 5039–5049; R. Exhs. 4–7.)

2. Southall's physical examination

Dr. Arvind Viradia administered the preemployment physical to Southall on September 19, 1990. Dr. Viradia is a highly qualified medical professional who is presently licensed to practice internal medicine in four states (i.e., West Virginia, Virginia, New York, and New Jersey), and is on the Board of Internal Medicine in the State of West Virginia. He also has a private practice in West Virginia, and teaches at the Charleston Medical Center that is affiliated with West Virginia University. He had been conducting preemployment physicals for Brown & Root for about 2 years (Tr. 2645–2648; G.C. Exh. 21; R. Exh. 94). The Employer (without contention, and fairly) asserts given the extent and number of his medical activities, compared to the relatively limited time he devotes to performing physicals for Brown & Root, it is clear that Dr. Viradia is not dependent upon Brown & Root financially.

Dr. Viradia identified General Counsel's Exhibit 21 as the Brown & Root physical form both he and Southall filled out on September 19, 1990. The writing on the second page of the form represents his contemporaneously made record of the results of the physical examination he performed on Southall (except for the vital signs and vision filled out by his medical assistant). It shows under physician remarks ''Can't climb; weakness of grip'' (Tr. 2648–2650; G.C. Ex. 21).

Dr. Viradia testified that based on his standard 2-year-old practice of performing Brown & Root physical examinations, and of recording the results thereof, he always contemporaneously wrote down his observations, diagnoses, and any information told to him by his patients (Tr. 2671). Dr. Viradia had diagnosed that both of Southall's hands were deformed and both grips were weak, symptoms suggestive of arthritis. Dr. Viradia entered ''grip weak, deformity'' where the examination form requested an evaluation of the upper extremities. Dr. Viradia testified that Southall told him during the examination that he had crippling rheumatoid arthritis, and that he could not climb.

Southall testified that he told Dr. Viradia at his physical examination that he had rheumatoid arthritis and that as a result, *he could not climb high, but that he could still climb up to 6 to 8 feet* (Tr. 662, 663, 665). Southall assertion is fairly to be viewed (at best) that he could climb 6 to 8 feet as compared with his definition of high in terms of 100 to 200 feet elsewhere.

Dr. Viradia initially testified, when he examined Southall, he determined Southall was unable to climb and that climbing a ladder, even at low heights, would be a problem for him (Tr. 2664–2665). Dr Viradia clarified that Southall could not work off of a ladder (high or low); but he thereafter indicated that Southall probably could climb the (last discussed) 8 foot ladder) (Tr. 2666). Dr. Viradia could not recall whether Southall had said that he could not climb high, though if Southall had said that, Dr. Viradia's practice would be to record what Southall said, namely, that he could not climb high. After Southall spoke with Dr. Viradia and received a copy of the examination form, he (plausibly) at first did not pay attention to it. Though Southall states he later noticed it, Southall acknowledged that he did not ever tell Dr. Viradia that the doctor had mischaracterized his physical limitations, or call him and ask him to correct it (Tr. 719–720).

As a result of this diagnosis, Dr. Viradia gave Southall a grade B physical rating, signifying a chronic medical condition which may interfere with some but not necessarily all work. (An ''A'' rating means that a person has no physical limitations, or any diseases; a ''C'' rating means the individual has a severe medical condition which may disqualify him from all work.)

3. Company informed Southall ''can't climb due to advanced arthritis;'' and the subsequent developments

On September 24, 1990, 5 days' later, Dr. Viradia sent a letter to Brown & Root (R. Exh. 95) in which he wrote:

> Mr. Southall was examined by me on September 19, 1990. From the patients [sic] history, he is suffering from long standing Rheumatoid Arthritis and has deformity of hands and weakness of grip. He also has stated that he can't climb due to advanced arthritis.

Consistent with a standard procedure of contacting Brown & Root when any new hire receives a grade ''B'' or ''C'' physical, Dr. Viradia also telephoned the Brown & Root safety supervisor at DuPont and advised that Southall had a weak grip and could not climb (Tr. 693–694, 2360–2361, 2377, 2654–2655).

Project Manager Edward White learned of Southall's condition from the safety supervisor. White also testified that he was not told that Southall could not climb ''high,'' but rather that Southall could not climb. Moreover, White testified that Johnson also told him, during a subsequent conversation, that Southall flatly said he could not climb (Tr. 2377–2380). After conferring with the safety supervisor, Dupont Project Manager White determined that, because welders at DuPont were required to work at an elevated level on ladders, scaffolding, and platforms, it would be hazardous to allow Southall to work as a welder. White told Johnson a few days later that Southall was unable to climb because of his ar-

thritic condition, and advised Johnson to contact Southall and tell him there was no permanent groundwork for welders at DuPont (i.e., no fabrication shop), and that the bulk of Brown & Root's work at that time was at height (Tr. 2361–2363, 5049).

Subsequently, Southall and Johnson engaged in a series of oral and written contacts related to Southall's ability to perform the work for which he was hired. Southall claimed at hearing that during these contacts, he told Johnson that he could climb, but not high, and that he was not refusing to work, just refusing to climb high (Tr. 665–666, 677, 724). (Southall has also acknowledged that he did not tell Johnson what his definition of high was; and, perhaps even more significantly, has testified that Johnson did not then ask. In contrast, Johnson and White (to whom Johnson recounted his conversations with Southall) consistently testified that Southall said he could not climb, made no reference to height, and refused to climb on the job.)

In response to White's instructions, Jo'nson called Southall and explained they had a welding job available for him, but that they could not guarantee him that all his work would be on the ground. According to Johnson, Southall then said that he would be unable to accept the job in that case because he would be a danger to himself or to others. Johnson, however, told Southall that he would double check to make sure we could not accomodate him in some way. Following this discussion with Southall, Johnson spoke with White again and told him that Southall said he could not climb. Johnson reaffirmed with White that because there were no permanent jobs at ground level, a newly hired welder would have to work at height (Tr. 2364–2365, 5050–5051).

Johnson called Southall back one last time, again explained that Brown & Root could not guarantee that his work would be on the ground, and asked him whether he was refusing the job. Southall responded that he was not refusing the job, but only refusing to climb. Johnson then asked Southall if he was refusing the job under the condition he had to climb, and Southall again said that he was only refusing to climb. (Johnson plausibly explained he feared a possible handicap discrimination suit, and, therefore, was reluctant to simply deny Southall the job.

In a further effort to avoid a handicap discrimination action, Johnson testified that he had also asked Pribyl whether the Rhone-Poulenc project could accommodate Southall. Pribyl said no since all of his welders needed to be able to climb. Since Southall's physical condition could not be accommodated in the available welding work, Brown & Root wrote Southall so informing him (below); and Brown & Root paid Southall $140 for his time spent on the welding test and at the physical (Tr. 2366, 5051–5052).

4. The written correspondence

Johnson sent Southall a letter dated September 25, 1990 (G.C. Exh. 22) stating that Brown & Root cannot guarantee that all work done by welders will be on the ground, and the contrary is indicated. Johnson stated, ''Since you stated that you are unable to climb, we understand that you are unable to accept our job offer.'' Johnson had therein informed a ''substantial portion of the work done by [Brown & Root] welders will be at height.'' Southall responded in an undated letter (G.C. Exh. 23(a) but apparently received by Johnson October 11, 1990) saying that he was not refusing to accept the job. Southall's letter pertinently stated, ''You send me to the doctor he said I couldn't clime [sic]. In my past 30 years of working I have never been refused a job Because [sic] I couldn't clime.'' Employer has argued that Southall's letter did not state that Southall could take the job provided there was no high climbing (Tr. 666, 670–711, 731–733; G.C. Exh. 23(a)).

Johnson then sent a final letter (G.C. Exh. 24) that is essentially the above chronology of events clarifying Johnson's understanding of Southall's inability to climb. The letter stated that, ''Brown & Root has done it's [sic] best to accommodate you. As I stated in my previous letter, should a pipewelder position become available in the near future that does not involve climbing, I will be glad to reconsider your application for employment.'' Southall did not respond to this letter.

5. The contentions

The General Counsel contends Respondent made a decision to hire Southall and arranged for Southall to have the standard physical required of applicants. The Respondent decided to hire Southall, subject to that physical, because it had a need for welder-pipefitters. Southall had clearly indicated his union sympathies by writing ''voluntary organizer'' on his application. Southall failed the physical because of arthritis in his hands, a chronic condition he has had for many years. The General Counsel submits, under a *Wright Line* analysis, Respondent would have put Southall to work *but for* his union activity and/or sympathy. Respondent, having closed (ended) its previously announced policy of not hiring applicants who wrote ''voluntary organizer'' on their applications by this time, and admittedly having a job opening for which Southall was qualified would have been hard pressed not to offer employment to Southall, as it did. (But this argument fails to take into sufficient account that this same Employer hasn't made any *offers* to the 47 named discriminatees above.)

The General Counsel's next argument is that given the strong antiunion animus of the Respondent, is it not surprising Respondent decided not to hire Southall after it obtained the results of his physical. Under *Wright Line* analysis, Southall's years of experience as a pipefitter (known to Respondent through Southall's application) should be considered; and, although Southall has had arthritis for some time, it never interfered with his employment. Respondent claims arthritis in his hands could affect Southall's ability to climb ladders. (If the General Counsel contends that Southall has climbed on other jobs in the manner he would have had to at the DuPont job, he doesn't make that case.)

The General Counsel relies on Pribyl's testimony that welders normally do not do much climbing. Although all welding positions might require some climbing, Pribyl estimated that pipe racks requiring climbing were anywhere from 20-feet high to 60-feet high. Ladders that would actually be required to be climbed were usually only 20- or 21-foot high, although there are ladders bigger than that. On a given workday, there is no way of saying whether a welder would have to do any climbing. He might be on the ground all day long. But Pribyl also testified that he did not have any positions where a welder was never required to climb; and, he had no (ground) fabrication shop (4926–4927).

In the end, the General Counsel must rely on the assertion that throughout his employment career Southall had been able to grip ladders with his hands at low levels as required as required to climb an 8-foot ladder to work station. The General Counsel finally argues if Southall had not been a union supporter, it is then reasonable to think Respondent would have at least further inquired as to how Southall's arthritis affected his employment in the past. The General Counsel argues that rather than doing that, Respondent seized on an available excuse to avoid hiring a union organizer; and, in light of Respondents strong antiunion animus, Respondent, clearly in need of a welder-pipefitter, would have hired Southall, if he had not been a union sympathizer.

Employer's threshold motion to dismiss complaint allegation as to Southall because the charge alleging unlawful refusal to hire at DuPont was encompassed within another charge that was dismissed in its entirety, is without merit. As noted earlier, Brown & Root's decision not to consider applicants who applied as union organizers was reversed about mid-June 1990 following the cessation of illegal union picketing at Rhone-Poulenc plant (Tr. 2382, 2396, 4904). The Employer asserts Brown & Root thereafter extended several offers to applicants who had identified themselves as voluntary union organizers on applications (Tr. 4989), but, again, as I have found, not to any of the now determined 47 Boilermakers discriminatees.

Employer otherwise contends, as with any company hire, Southall's hire was subject to receiving a satisfactory rating on his physical examination. Thus Employer argues that Dr. Viradia's highly credible and disinterested testimony standing alone compels the conclusion Southall could not climb and, therefore, could not perform the welding work for which he was hired. It is convincing evidence of what he diagnosed and reported to Brown & Root; namely, that the physical examination performed on Southall had revealed that Southall suffered from crippling rheumatoid arthritis, which resulted in weak grip and precluded Southall from climbing.

It is uncontroverted that Brown & Root adopted a policy of considering voluntary organizer applications in June 1990, and actually hired Southall for a pipewelder's position at DuPont, because of his prior work experience with DuPont and Brown & Root's desire to fill a work group of such experienced employees as it had promised Dupont that it would do, but subject to his satisfactorily passing medical and welding exams. Southall was qualified for the job in skill and had the desired previous DuPont experience, important characteristics for Brown & Root at that site. It is uncontroverted that Brown & Root had offered Southall a job, and prepared all the necessary paperwork to place Southall on payroll, had incurred the expenses of administering drug, welding, and medical tests, rescheduled missed welding test; appears to have made reasonable effort to accomodate Southall, and when that failed paid him $140 for his time.

The Employer argues, and in general I agree, that it strains credulity to suggest the Employer would incur all of this time, effort and expense just to thwart Southall's hiring at the final bell because he had written voluntary organizer on his application, especially since Employer had already begun hiring others who had put on their application that they were ''Volunteer Union Organizer.'' Southall is not a member of the Boilermakers organization. (Employer's refusal to consider for hire, or to hire, appears limited to the 47 now determined Boilermaker discriminatees.)

Employer argues that this conduct was wholly inconsistent with an intent to discriminate against Southall, such that the General Counsel has failed to meet its burden of showing the intent necessary to establish a prima facie case of a 8(a)(3) violation of the Act, *Howard Electric Co*., 285 NLRB 911 (1987), enfd. granted *NLRB v. Howard Electric Co*., 873 F.2d 1287 (9th Cir. 1989). In light of earlier findings of Employer failing to consider for hire and failing to hire 47 Boilermakers applicants who had similarly written on aplications that they were a ''Volunteer Union Organizer'' (or words to that effect), and, that Southall had applied for work with Brown & Root on April 17, 1990, well before its change of policy in that regard, I am not persuaded as Employer has urged that the General Counsel had failed to make out a prima facie case, at either Rhone-Poulenc jobsite, or Dupont jobsite, though I do not overlook the number of likely applicants ahead of him shown of record at the Rhone-Poulenc jobsite, before he applied.

In any event, I am persuaded, Employer's convincing argument is that since all welding positions at DuPont (and Rhone-Poulenc) required ability to perform work as required at elevated levels off ladders, scaffoldings, and platforms, and all welders had to be able to climb as part of the job requirement, Brown & Root has shown not only that Employer was unable to accommodate Southall's limitations and thus he has never worked for the Company, but that that outcome would have likely been the case, even if Southall had not engaged in protected conduct, and been offered such job, that on taking phsical he would have likely similarly failed. Accordingly, for all of the above reasons, I find that Brown & Root did not refuse to consider for hire or to hire Southall because of his union status, and therefore, I conclude and find that the Company did not violate Section 8(a)(3) and (1) of the Act, by failing to employ Ralph Southall as a pipefitter welder. I shall recommend that this allegation be dismissed.

Employer has also argued that this, and all charges herein should be dismissed by the Board, because Employer had lawfully subpoenaed certain material documentary evidence, pertinently videotapes made of certain days of the picketing in the possession of WVA Building Trades Council, which tapes were subsequently destroyed after service of the subpoena. Employer thus claims it has been wrongfully denied use of such evidence to prove its case for illegal picketing, and of the discriminatees engagement in unlawful picketing. Employer thus urges the Board should in these circumstances act to enforce its lawful subpoena process, by a dismissal of all the charges herein. I construe Employer's request as a motion. In my view, Employer's motion to dismiss as to Charging Party 2 WVA Building Trades Council's charges in regard to Southall is effectively rendered moot by the above substantive findings. The application of such a harsh remedy to Boilermakers International is wholly unwarranted. As far as this record discloses Charging Party Boilermakers International has fully responded to all lawfully served subpoenas served upon it. Indeed the record reflects Counsel on all sides had cooperated admirably in the voluntary production of all material documents and witnesses.

CONCLUSIONS OF LAW

1. Brown & Root USA, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers & Helpers, AFL–CIO, and its Local 667, and West Virginia Construction and Building Trades Council, and Charleston Construction and Building Trades Council, each respectively, is a labor organization within the meaning of Section 2(5) of the Act.

3. Safety And Fair Employment (SAFE) is an instrumentality and an alter ego of Charleston Construction and Building Trades Council.

4. By refusing to consider for hire, or to hire the 47 Boilermakers applicants named in the Appendix, because they stated on their application that they were a Boilermakers Local 667 ''Volunteer Union Organizer,'' (or words to that effect), and because of their lawful assistance to the foregoing labor organizations, or engagement in other protected concerted acts of mutual aid and protection, Respondent has thereby violated Section 8(a)(3) and (1) of the Act.

5. By pipe and welding general foreman Oscar Cole's statement to employee Tom Lucas, ''Well, I guess you know that if the Union gets in here, that none of us will have a job—or we'll all be out of a job,'' Respondent Brown & Root has threatened employees with loss of employment if they select the Union as their representative, in violation of Section 8(a)(1) of the Act.

6. Respondent Employer has not violated the Act in any other manner alleged in the consolidated complaint, except as found and stated above.

7. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that, since October 18, 1989, Respondent unlawfully refused to consider for hire, or refused to hire the 47 Boilermakers applicants named in the Appendix attached hereto for discriminatory reasons, and not for any of the comparaatively few instances of misconduct, determined above, it is recommended that Respondent be ordered to offer them employment and to make them whole for any losses of earnings they may have suffered, without prejudice to any seniority or other rights and privileges they would have previously enjoyed, had they been considered for hire and hired without discrimination, provided that in instances of discriminatees Harvey Fleck and Gilmer Mosteller, Employer will first be afforded an opportunity to fully examine them on (only) their misconduct on the picketline (if any). The make-whole remedy will be in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[1]

Final determination of job availability at Brown & Root's jobsite at Rhone-Poulence and possible backpay liability may be appropriately left to compliance. I shall further recommend that any issues of whether the 47-named Boilermakers applicants (or any of them who would have been hired) would have been transferred to other jobsites, be left to the compliance stage of the proceeding, pursuant to *Sunland Construction Co.*, 311 NLRB 1036 (1993). I shall also recommend an expunction order of any company records recording that the above-named 47 Boilermakers applicants were not to be considered for hire for discriminatory reasons found herein. I will further recommend Employer notify each of the above-named 47 Boilermakers applicants that it has done so; and, notify any applicant that it does not now employ because of a lack of job availability then, that it now has no objection to considering them for hire in the future on a nondiscriminatory basis. An appropriate notice to employees will be provided.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Brown & Root USA, Inc., Institute, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to consider for hire, or to hire applicants who state on their applicants ''Volunteer Union Organizer'' (or words to that effect), or, because of their union or other protected concerted activities.

(b) Telling our employees that if the Union gets in here, that none of us will have a job—or we will all be out of a job, or, in any other manner unlawfully threaten our employees with loss of employment if they select the Union as their representative, in violation of Section 8(a)(1) of the Act.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Offer employment to the discriminatees listed on the Appendix, and make them whole for any loss of earnings they may have suffered because of Respondent's unlawful refusal to employ them, in the manner described in the remedy section of this decision.

(b) Remove from its books and records all record of its unlawful refusal to consider for hire or to hire the 47 Boilermakers applicants named in the Appendix because they put on their on their application ''Volunteer Union Organizer'' (or words to that effect), or because they engaged in other union, or other protected concerted activity, and inform each of them in writing that this has been done, and that any evidence of such action will not be used as a basis for any future personnel actions against them.

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[1] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of Taxes as set out in the 1986 amendments to 26 U.S.C. § 6621. Interest accrued before January 1, 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Houston, Texas facility, and at it jobsite at Rhone-Poulenc in Institute, Virginia, or, if that job no longer exists, then in each of its other jobsites in the State of West Virginia, copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''